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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, NAACP, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

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Question Presented.

Can a district court in an employment discrimination case grant increased competitive job security to junior minority city firefighters who are not victims of past discrimination by suppressing a *bona fide* civil service statute requiring layoffs by seniority exclusively, to the detriment of senior non-minority firefighters then terminated out of seniority?

List of Parties.

The parties listed in the caption were the parties in district court intervenor Local 718's appeal in Court of Appeals No. 81-1642. In addition, the Civil Service Commission and Director of Personnel Administration of the Commonwealth of Massachusetts were defendants in the district court and appellants in No. 81-1656.

Pedro Castro and the Civil Service Commission and Director of Personnel Administration were plaintiffs/appellees and defendants/appellants in the district court and the court of appeals in a separate action consolidated for administration and argument in the district court and the court of appeals. Boston Police Patrolmen's Association, Inc. is an intervenor and appellant in that separate, administratively consolidated action.

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No.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Boston Firefighters Union petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this court to review the First Circuit's judgment in *Boston Chapter NAACP, et al.* v. *Beecher, et al.* (CA 1, Nos. 81-1642, 81-1656, 81-1650, and 81-1651, May 11, 1982).

Opinions Below.

The consolidated opinion of the court of appeals is reported at F.2d and 28 FEP Cases 1657 and is reproduced at pages A1 through A26 of the Appendix hereto. The consolidated opinion of the district court is reported at 522 F. Supp. 873 and is reproduced at pages A30 through 38 of the Appendix. The Memorandum and Order of the court of appeals denying petitioner union's motion to stay the district court's order is reproduced at page A49 of the Appendix.

Previous opinions of the First Circuit and the district court in the separate cases are reported thus: *Boston Chapter, NAACP, Inc.* v. *Beecher, et al.*, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975); 371 F. Supp. 507 (D. Mass. 1975); 423 F. Supp. 696 (D. Mass. 1976), and *Pedro Castro, et al.* v. *Beecher, et al.*, 334 F. Supp. 930 (D. Mass. 1971); 459 F.2d 725 (CA 1 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975). The former case is referred to as the "fire case," and the latter case as the "police case" by the court of appeals.

Jurisdiction.

The court of appeals entered its judgment on May 11, 1982. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The constitutional provisions are: the equal protection component of the Due Process Clause of the Fifth Amendment.

The statutes are: 42 U.S.C. §§ 1981, 1983, 1988, and sections 703(a), 703(h), 703(j), 706(g), Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a), 2000e-2(h), 2000(e)-2(j), and 2000(e)-5(q); and Mass. Gen. Laws, Chapter 31, §§ 33 and 39.

Their terms are produced at A39 through A47 of the Appendix.

Statement of the Case.

A. *Introduction*

The court of appeals affirms an order of the district court which . . . "superseded the operation of the reverse seniority provisions of the Massachusetts Civil Service Statute. . . ." App. 16. The district court's order authorized Boston's termination of senior non-minority firefighters and its retention of junior black and Hispanic firefighters who were never victims of practices found illegal in 1974. The seniority statute, Mass. Gen. Laws, Ch. 31, § 39, enacts a bona fide seniority system, and was not adjudicated otherwise. The acknowledged objective of the order below was the maintenance of current racial and ethnic balances in the public safety departments: the district court proceeded on the premise that "[i]t is a percentage matter . . .: whether or not a certain percentage has to be maintained, increased, or decreased."

B. *The 1974 Decree*

Black and Hispanic applicants for firefighter appointments in Boston and other Massachusetts cities and towns and their associational representative (NAACP) commenced a class action in 1972 asserting that recruitment and certification procedures, and specifically the firefighter entrance examination developed and administered by the former Massachusetts division of civil service,* discriminated racially in violation of 42 U.S.C. §§ 1981 and 1983. Early the following year,

* The Massachusetts civil service structure changed effective July 1, 1975. The functions of the former division are now divided between the civil service commission and the personnel administrator.

the United States initiated another action asserting section 1981 and Title VII claims. The actions were consolidated.

The firefighter entrance examinations administered from 1968 through 1971 were found racially discriminatory on statistical grounds and lack of job relatedness. Word-of-mouth recruitment policies were also held to have resulted in unintentional discrimination. 371 F. Supp. 507, 510, 517 and 519-20 (D. Mass. 1974), 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975).

The 1974 decree required development and use of a job-related entrance examination; established priority certification groups and procedures for certification of firefighter job candidates; and directed that its procedures should apply to all cities and towns subject to the civil service statute having a 1% minority population until the complement of minorities in the fire department of such a municipality was commensurate with its minority population. *Id.* at 520-24. The court of appeals affirmed, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975).

Priority certification groups established for each fire department, from which the state division of civil service issued certifications of qualified candidates to each requisitioning department were: A "Group A" comprised of all black and Hispanic applicants who had failed the August 1971 or an earlier discriminatory entrance examination, but had passed the new examination; a "Group B" comprised of all persons on the division's eligibility lists developed from the August 1971 examination; a "Group C" comprised of all black and Hispanic candidates who passed a new examination excluding all Group A members; and a "Group D" comprised of all candidates other than members of Groups A, B, or C who passed a new examination. 371 F. Supp. at 522.

Candidates for Boston permanent fire department appointments were to be certified on the basis of one certification of

a victim from Group A for each certification from Group B until exhaustion of Group A; and thereafter, one certification was to be made from Group C for each certification from Group B. Put another way, all black and Hispanic candidates for Boston permanent appointment who had failed a discriminatory examination and passed the new one, (the victims) had an absolute priority over black and Hispanic candidates who never took a discriminatory test. No certification pairings between Group B and Group C occurred until after completion of the pairings between Group B members and all of Group A's members.[1]

C. *Post-1974 Examinations and Recruitment*

Under the auspices of a detailed April, 1975 interim consent decree, a specified new entrance examination was administered in July, 1975. This interim decree also directed that further examinations should be administered if that new examination did not yield sufficient Group C populations or if Group C's population became depleted.

As of April 1, 1977, the Boston Group C had been depleted and its Group C pool had to be repopulated through new examinations in July, 1977; June, 1978; and June, 1980. No Group C candidate who passed one of the four examinations was ever eligible for Group A membership by having failed any discriminatory earlier examination.

This 1975 and later orders implementing the 1974 decree, put major emphasis on effective preexamination recruitment. While the private and government plaintiffs expressed

[1] Prior to the first new examination and the start of the certification pairings, a 1975 interim decree contracted Group B's membership to all persons appointed as *provisional* firefighters per earlier court authorizations. Group B permanent appointments were deferred pending pairings with Group A or C certifications. Seniority under Mass. Gen. Laws, Ch. 31, § 33 commences only on permanent appointment.

reservations about recruitment prior to the 1978 examination, their criticisms on this occasion were resolved; and each new 1975, 1977, 1978 and 1980 firefighter entrance examination was preceded by satisfactory minority recruitment.

D. *Post 1974 Hiring*

Boston's permanent firefighter appointments after the establishment of Group C through to the 1981 layoffs are:

	Total Hired	*Blacks and Hispanics Hired*	*Non-Minorities Hired*
1976	79	34	45
1977	198	90	108
1978	179	87	92
1979	52	27	25
1980	45	10	35

Since every Group A victim member had priority over Group C member candidates and since Boston's initial Group C population was depleted by April 1977 (without another Boston eligibility list being in place earlier than November 1977), the 124 black and Hispanic persons hired in 1976 and 1977 included all victims of the August 1971 and earlier discriminatory examinations and deficient recruitment. It is possible under the terms of the 1974 decree that the Group A victim category could be revived, but inquiry has not identified the existence of a single instance of such a revival.

Conversely, and significantly, the 117 black and Hispanic firefighters appointed in 1978, 1979, and 1980 were first-time new entrance examination candidates who enjoyed the benefit of satisfactory recruitment programs.

E. *The 1981 Layoffs*

Early in July 1981, Boston initiated a systematic program of terminations from its fire department because of alleged fiscal exigency. Prior to commencement of the layoff waves, Boston's fire department employed 1690 sworn personnel, of whom 248, or 14.7% were black or Hispanic persons. If the 207 layoffs *announced* by Boston had observed the seniority layoff terms of Mass. Gen. Laws, Chapter 31, § 39, 113 blacks or Hispanic persons, all hired in 1978 through 1980, would have been terminated. Their layoffs would have left a 9.1% black and Hispanic representation in the Boston fire department.[2]

Instead of stopping at that announced target, Boston's program extended to 257 discharges. The August 7, 1981 order permitted termination of only 38 blacks and Hispanic firefighters so that implementation of the final reduction program demanded termination of 219 non-minority firefighters (including a very substantial number enjoying superior statutory seniority to that of retained black and Hispanic members). If statutory seniority had been observed, the final layoffs would have extended into but not through the 1978 hires. However, Boston had to retain all of the black and Hispanic firefighters hired in 1978 (save for one individual) by terminating all non-minority firefighters hired in 1978 and 57 non-minority firefighters hired in 1977. Approximately another 50 non-minority firefighters appointed in 1978 would have also retained their jobs if the seniority statute regulated the order of layoffs. Thus, over 100 non-minority firefighters saw their seniority extinguished through a district court order that insisted on its suppression, resulting in their discharge.

[2] At the outset of the litigation in 1972, that percentage was only 0.9%.

The Court of Appeals acknowledges that the approximately 100 retained junior black and Hispanic firefighters so preferred were not identified victims of past acts of discrimination[3] and that this case is "a case of two competing rights, earned seniority versus ... racially balanced police and fire departments." App. 24.

F. *The 1982 Recalls*

During April 1982, Boston rehired 100 laid off firefighters. Under the seniority statute, Mass. Gen. Laws, Chap. 31, § 39, rehirings must follow seniority. However, compliance with the August 7, 1981 order demanded that Boston rehire 15 junior black and Hispanic firefighters whose seniority was inferior to that of 15 non-minority laid off employees who continued in unemployment.

In June 1982, Massachusetts enacted an omnibus-type bill providing Boston with new revenues. A feature of that special legislature is a requirement that Boston rehire all police officers and firefighters terminated since July 1, 1981. All personnel available for recall were reinstated by July 1, 1982. However, their reinstatement does not erase the salary losses inflicted by the terminations and the interruption of their employment may defer their eligibility to sit for promotional examinations.

The August 7, 1981 order enjoined the Massachusetts Civil Service Commission from disapproving any appeals of terminations contesting the method of termination set forth in the order. Appeals followed to that Commission and are pending, with reservations of appellants' rights pending this final review of that August 7th order.

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[3] There are even doubts that a substantial number of these retained junior personnel were old enough to have taken the 1968 through August 1971 examinations.

Reasons for Granting the Writ.

I. This Decision Conflicts with Decisions of the Second, Third, Fifth and Seventh Circuits.

Racially conscious hiring factors are not challenged by nor implicated in this petition. At issue are job losses to non-minority firefighters despite their valid superior seniority because of a court order insulating junior black and Hispanic employees from discharge.

Setting aside a seniority system to secure racial preferences for job retentions conflicts in principle with decisions of this court, and is in total conflict with decisions of other courts of appeals. Racially neutral layoff systems operating on the seniority principle have been sustained against attacks mounted under Title VII and 42 U.S.C. §§ 1981 and 1983 by the second, third, fifth and seventh circuits. *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (CA 7 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co.* v. *IBEW, Local 327*, 508 F.2d 687 (CA 3 1975), *cert. denied*, 425 U.S. 998 (1976); *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (CA 5 1975); and *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d 993 (CA 2 1976), *cert. denied*, 431 U.S. 965 (1977).

Chance v. *Board of Examiners & Board of Education, id.*, conflicts squarely. There, a class action on behalf of minority candidates pursued under 42 U.S.C. §§ 1981 and 1983, challenged examinations and job placements were made through court orders. Several years later, layoffs ("excessings") were announced for fiscal reasons and the district court entered an order virtually identical to the one contested here: maintenance of its percentages required layoffs of non-minority employees possessing superior seniority under statutory and collectively bargained provisions. The second

circuit reversed, holding that racially neutral layoff systems using the seniority principle must be protected, and that a nonremedial distortion by preferential treatment racially was illegal discrimination. *Chance*, *id.*, in its essential premises presents the same issues raised in this case.

Local 718 acknowledges that decisions of the sixth circuit support the holding below: *Stotts* v. *Memphis Fire Department*, Nos. 81-5348 and 81-5349 (CA 6, May 7, 1982), 28 FEP Cases 1491, most recently sustained a district court's order enjoining any reduction in the percentages of blacks in fire department classifications, even though the order conflicted with a bona fide seniority system. Circuit Judge Martin, concurring and dissenting, disavows the holding of the panel, noting ... "this court has not been presented with the contention that the decree constitutes 'reverse discrimination.' " *Broum* v. *Neeb*, 644 F.2d 551, 564 (CA 6 1981) does hold that a seniority system can be set aside by an order identical in its substantive terms to the August 7, 1981 order disputed here.[4] Another panel in the sixth circuit denied the same relief in *Youngblood* v. *Dalzell*, 568 F.2d 506 (CA 6 1978).

The conflicts between the position of the second, third, fifth, and seventh circuits and the position of the first and sixth circuits commend granting the writ.

The context in which these divergent views arise also commends its grant. Petitioner, Local 718 believes that many states provide in civil service and personnel statutes for seniority as an exclusive or significant factor in work force

[4] *Brown*, *id.*, acknowledges that *Teamsters* v. *U.S.*, 431 U.S. 324, (1977) immunizes a *bona fide* seniority system from a Title VII attack but deems *Teamsters* inapplicable to suits under 42 U.S.C. §§ 1981 and 1983. This asserted distinction so important to *Brown*'s result seems meritless in light of *New York Trans. Auth.* v. *Beazer*, 440 U.S. 568, 583 (1979); other circuit court decisions reject any broader power under sections 1981 and 1983, i.e. *Setser* v. *Novak Inv. Co.* (CA 8 1981), *Gurmankin* v. *Constanzo*, 556 F.2d 184 (CA 3 1977). *See*, *infra*, pp. 15, 6.

reductions.[5] This wide use of seniority in conjunction with the current apparently national trend towards fiscal retrenchment in local governments[6] suggests that this issue of seniority suppression to sustain commensuration will be recurrent. It is an issue of national importance and its resolution will affect minimally thousands of employees in the public and private sectors. This diversity in circuit views and the significant character of the underlying issue fully warrant grant of certiorari. *Calhoun* v. *Harvey*, 379 U.S. 134, 137 (1964).

II. This Decision Conflicts with Applicable Decisions of this Court and Presents Important Questions of Federal Law which Should be Settled by this Court.

The Court of Appeals rejects decisions of this Court dealing with seniority issues in employment discrimination cases. Instead that court now casts this action as one to correct a racial imbalance, and not litigation to secure individual relief. App. 22. This present characterization, doubtful in its own premises, cannot disguise the litigation: it is a suit by black and Hispanic *applicants*, individually and as class representatives contesting a public protection service entrance examination and recruitment practices. Its pleadings, theories, proofs and prior orders have always defined an employment discrimination case of a conventional and familiar character. The principles set forth in this Court's decisions during the past decade control its course.

Competitive seniority is now the focus of the litigation. The decision below insists that a seniority system regulating

[5] Citations are collected in the Appendix at p. A47, 8.

[6] *See:* Petition for Certiorari, *Local 66, Boston Teachers Union, AFT, AFL-CIO* v. *Boston School Committee*, No. 81-2306, p. 10. Seventeen thousand, five hundred state and local government employees filed employment security claims at the Massachusetts Division of Employment Security during FY 1982. *The Boston Globe*, July 1, 1982, at 40, col. 3.

layoffs must yield to a judicial mandate that specific racial and ethnic population percentages be maintained in a fire suppression force.

This seniority issue is a familiar and typical one. The seniority layoff statute, Mass. Gen. Laws, Ch. 31, § 39, satisfies the criteria of neutrality, rationality in the relevant employment sector, and freedom from discriminatory genesis and from illegal purpose approved by *Pullman-Standard, Div. of Pullman, Inc.* v. *Swint*, ___ U.S. ___, 50 U.S.L.W. 4425, (April 25, 1982) and *Teamsters* v. *United States*, 431 U.S. 324, 355-6 (1977). No party has suggested otherwise and its bona fide character is conceded. *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 50 U.S.L.W. 4364, 4367-8 (April 5, 1982) and *Teamsters*, 431 U.S. at 348-57 immunize this seniority system from the suppression directed below.

The controlling principle here is not novel. It is the award to *victims* of constructive seniority, an approach rejected by the court of appeals with the candid explanation that junior black and Hispanic Group C appointees benefited by the August 7, 1981 order were not victims of the practices condemned in 1974. They could be eligible for no seniority placement other than date of permanent appointment as Mass. Gen. Laws, Chap. 31, § 33 entitled them.

The junior Group C appointees are in no different status than non-victim class members in any other employment discrimination suit. They should not be entitled to any greater competitive edge.

Franks v. *Bowman*, 424 U.S. 747, 756 (1976) acknowledges the propriety of awards of competitive seniority inserting victims in their rightful places in the seniority hierarchy. Only identified victims are so entitled; and class members, if they are not actual victims, must be denied that competitive advantage. *Id.*, at 764, N. 41; 772-3. Actual victim status is prerequisite to relief disadvantaging other employees. *Team-*

sters v. *United States*, 431 U.S. at 365-372. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. ____ (1982); 50 U.S.L.W. 4238, 4242 (February 24, 1982).

The seniority suppression and senior employee layoffs here are precisely the conditions censured by this court in *Ford Motor Co.* v. *Equal Employment Opportunity Commission*, 50 U.S.L.W. 4937, 4942 (June 29, 1982):

> As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ____, ____ (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
>
> The sacrifice demanded by the lower court's rule moreover leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the "large objectives" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden. (notes omitted).

The order here contested "compell[ed] innocent workers to sacrifice their seniority" to persons who could not validly assert any claim entitling them constructive seniority. The hard fact is that the senior workers were "relegated to the

unemployment lines" only because they were not members of a preferred racial/ethnic category.

Ford Motor Co. v. *E.E.O.C.*, *id.* at 4943, confirms the consideration due to the rights of innocent third parties: "The rule, moreover, threatens the interests of other innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority." The order in this case so subjugated the interests of senior innocent employees who found themselves on the street because of its terms.

The court of appeals denies that its opinion involves seniority, putting the issue thus at App. 20, 1:

> This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination.

The denial in the first clause is a fiction. The order here conferred superseniority. The premises of the second clause —the irrelevancy of victim status and authority to mandate desirable population ratios—conflict in principle with, and are contrary to the holdings of, decisions of this court. The first premise that victim status is irrelevant is at fundamental odds with *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364; *Pullman-Standard Division of Pullman, Inc.* v. *Swint*, 50 U.S.L.W. 4425; *Ford Motor Co.* v. *EEOC*, 50 U.S.L.W. 4937; *Teamsters* v. *United States*, 431 U.S. at 365-372 and *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 764; 772-3.

The second premise that specific racial and ethnic percentages can be required ignores the plain terms of § 706(j) deny-

ing any requirement that the racial composition of any work force mirror a general population. *United Steelworkers* v. *Webber*, 443 U.S. 193, 206 (1979) and *Teamsters* v. *United States*, 431 U.S. at 339 n.20.

The authorities cited already are Title VII cases and this litigation also proceeds under 42 U.S.C. §§ 1981 and 1983. No decision of this court addresses the relationships between sections 703(h) or 703(j) and section 1981 explicitly. The disputed order, however, cannot rest on 42 U.S.C. § 1981.

Despite the suggestions of the court of appeals that its earlier decision, 504 F.2d 1017 (CA 1 1974), *cert. denied*, 421 U.S. 910 (1975), might not have been different had it been decided under *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Washington* v. *Davis*, 426 U.S. 229 (1976), the district court never made any findings of purposeful discrimination. The 1969-1971 entrance examinations were faulted because of disparate, non-job related impact on plaintiff's class. 371 F. Supp. at 507, 517, 521. The recruitment violation was an unintended one. *Id.*, at 519. Hence, absent "purposeful discrimination," neither the examinations nor the recruitment technique could violate section 1981. *General Building Contractors Association, Inc.* v. *Pennsylvania*, ____ U.S. ____, 50 U.S.L.W. 4975 (June 29, 1982). Surely, judgment did enter in 1974 and plaintiffs do not need to reestablish liability. The point is that the liability is established under Title VII only and the plaintiff class is entitled only to Title VII's remedies.

It is anomalous and even absurd to suggest that section 1981 can justify this extraordinary seniority suppression when it could not be countenanced under Title VII. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), implies that section 1981 confers no greater entitlements than does Title VII and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975), describes the remedies under both

statutes as coextensive. This coextension of remedies is required by 42 U.S.C. § 1988 which directs that "...jurisdiction (in section 1981 litigation) ... shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect ..." *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-5 (CA 4 1978), *cert. denied*, 440 U.S. 979 (1979) [section 1988 through § 706(h), protects seniority systems], *accord*, *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d at 998 and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d at 1320 n.4.

The order is also inconsistent with other decisions of this court bearing on affirmative action programs. The district court entered its order after seniority based layoffs had occurred and compliance demanded rehiring junior black and Hispanic firefighters and corresponding firings of senior nonminority employees. Discharge of white employees on that ground violates § 703(a)(1) of Title VII and 42 U.S.C. § 1981, *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280, 287-8 (1976). *McDonald*, *id.*, at n.8 reserved the question of permissible affirmative action programs "... judicially required or otherwise." *United Steelworkers* v. *Webber*, 443 U.S. 193 (1979) answers the reserved question as to one permissible voluntary affirmative action program. While approving the collectively bargained plan then before this Court, *Webber* also cautions that an affirmative action justification will not vindicate every method used for that end. There is ... "a line of demarcation between permissible and impermissible affirmative action plans," 443 U.S. at 208. Some of that line's bounds are sketched: the program cannot "trammel" the interests of white employees; its purpose cannot be secured by discharges of white workers; and its design cannot perpetuate racial percentages. The August 7, 1981 order trespasses into the impermissible by insisting on the

discharges of white workers to maintain a specified racial and ethnic profile in Boston's Fire Department. *McDonald, supra*, in conjunction with *Webber, supra* implies the conclusion that the order violated the Title VII and Section 1981 rights of a substantial number of white firefighters who would have remained employed save for the rigid demands of that order.

Ultimately, there is an issue of constitutional dimension. Can a person be divested of his occupation because he is not a member of a preferred racial or ethnic category? *University of California Regents* v. *Bakke*, 438 U.S. 265, 307 (1978), warns that such a result is constitutionally forbidden. *Accord, DeFunis* v. *Odegaard*, 416 U.S. 312, 341-2 (1974) (Douglas, J., dissenting). Here the error of the court below can be corrected without the need for a constitutional adjudication by this court for the reasons already argued. If those arguments are insufficient, the constitutional issue presented in *Bakke, supra* and *DeFunis, supra* can be settled definitively on the record here if that need occurs.

III. This Decision Is Not Moot.

The recent 1982 recalls do not call for denial of the writ. Senior non-minority firefighters have appeals pending before the Massachusetts Civil Service Commission seeking full relief for violation of their seniority rights including back pay orders and service credit restoration that the Commission is prevented from resolving by the terms of the August 7, 1981 order. While the omnibus state legislation just enacted provides that the firefighters terminated during the 1981 layoffs can never be laid off again for fiscal reasons (but not for technological or tactical change reasons), the underlying dispute as to the validity of this order continues and its resolution affects their interests and interests common to other firefight-

ers represented by Local 718 and it can recur. There is still substantial interest and injury to warrant the relief. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123 (1974).

Conclusion.

This decision conflicts with decisions of other circuits and is inconsistent directly and in principle with decisions of this court. The decision raises sensitive and important federal law issues that should be settled by this court.

For these reasons, this petition for writ of certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

Nos. 81-1642
81-1656
81-1650
81-1651

BOSTON CHAPTER, NAACP, ET AL.,

PLAINTIFFS-APPELLEES,

v.

NANCY B. BEECHER, ET AL.,

DEFENDANTS-APPELLANTS,

and

BOSTON FIREFIGHTERS UNION, LOCAL 718,

INTERVENOR-APPELLANT.

PEDRO CASTRO, ET AL.,

PLAINTIFFS-APPELLEES,

v.

NANCY BEECHER, ET AL.,

DEFENDANTS-APPELLANTS,

and

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,

INTERVENOR-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF MASSACHUSETTS

[HON. ANDREW A. CAFFREY, *U.S. District Judge*]
(522 F. Supp. 873)

Before
CAMPBELL, BOWNES and BREYER,
Circuit Judges.

E. David Wanger, with whom *John F. McMahon*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Intervenor, Appellant Local 718 in Case No. 81-1642.

Frank J. McGee, on brief for Intervenor-Appellant Boston Police Patrolmen's Association, Inc.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1651.

Marc S. Seigle, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for the State Defendants-Appellants in Case No. 81-1656.

James S. Dittmar, with whom *Berman, Dittmar & Engel, P.C.*, *Judith Bernstein Tracy*, and *Peggy A. Wiesenberg* were on brief, for plaintiffs-appellees.

May 11, 1982

BOWNES, *Circuit Judge*. This case arises from a conflict between a statutorily established seniority system mandating layoffs on a last hired, first fired basis and court orders insulating a percentage of minorities from such system. Shortly after the July 1981 beginning of fiscal 1982, the Police and Fire Department of the City of Boston embarked upon a program of massive reductions in force, allegedly precipitated by budgetary restrictions imposed by "Proposition 2 1/2." During the six-year period prior to the commencement of the layoffs, both departments had been steadily increasing the percentage of their black and hispanic members pursuant to consent decrees designed to remedy the present and continuing effects of past racial discrimination. The consent decrees were silent as to layoffs. If this reduction in force were conducted according to strict seniority as prescribed by Massachusetts law,[1] roughly half of the blacks and hispanics hired would be laid off. To prevent this substantial undoing of the progress made in integrating blacks and hispanics into the police and fire departments, the district court granted plaintiffs' motions in these four consolidated cases to modify the prior consent decrees by pro-

[1] Mass. Gen. Laws Ann. ch. 31, § 5.

hibiting both departments from reducing the percentage of blacks and hispanics in their respective work forces below the level obtaining at the commencement of the force-reduction program. Defendant Massachusetts Civil Service Commission (the Commission) and intervenors Boston Firefighters Union, Local 718, and Boston Police Patrolmen's Association, Inc., have appealed.

There are three fundamental issues: did the district court have the power to modify the consent decrees and, if so, did its orders impermissibly supersede a valid Massachusetts civil service statute or unconstitutionally impose reverse discrimination.

In order to understand the issues and to analyze properly the district court's modification of the consent decrees, it is necessary to begin by tracing the prior proceedings.[2]

The Police Case

Plaintiffs, unsuccessful black and hispanic candidates for appointment as Boston police officers, commenced the police action in 1970. They claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with the recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police

[2] We refer throughout this opinion to *Castro et al.* v. *Beecher et al.*, and related proceedings as the "police case." The police case is reported at 334 F. Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975). Similarly, we refer to *Boston Chapter, NAACP, Inc., et al.* v. *Beecher, et al.*, and related proceedings as the "fire case." The fire case is reported at 371 F. Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); 423 F. Supp. 696 (D. Mass. 1976). Both the police and fire cases were reported most recently in Chief Judge Caffrey's consolidated opinion, 522 F. Supp. 873 (D. Mass. 1981), from which this appeal arises.

Department as well as other appointing authorities,[3] including other Massachusetts cities and towns and various state agencies. *Castro et al.* v. *Beecher et al.*, 334 F. Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.).

Following trial, the district court made extensive findings, including findings that in 1970, blacks represented 16.3 percent of the population of Boston but only 3.6 percent of its police force. The district court also found that the 1968-1970 Massachusetts Civil Service Police Entrance Examinations were not job related and discriminated against minorities, including plaintiffs, who did not share "prevailing white culture." *Id.* at 943. It enjoined the Commission from issuing further certifications based on these examinations.

We held on appeal that the examinations were racially discriminatory, and remanded the case with instructions that the district court enter a remedial order requiring a non-discriminatory, job-related examination and providing for certification of black and hispanic applicants on a priority basis, to be determined in accordance with guidelines that we set forth. *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 730-31, 737-38 (1st Cir. 1972). We noted that the prescribed remedy "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that relief fashioned by the district court "is to be more than token." *Id.* at 737.

On remand, after observing that unlike most consent decrees, this one had been preceded by full hearings, findings of fact, conclusions of law and several opinions both of the district and appellate courts, the district court approved a comprehensive consent decree, finding that it was "just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces . . . ." 365 F. Supp.

[3] Among the named defendants were the Metropolitan District Commission, the Massachusetts Bay Transportation Authority, and the Capitol Police. 334 F. Supp. at 934.

655, 660 (D. Mass. 1973). The decree provided, among other measures, for the creation of civil service certification priority pools, consisting of black and hispanic applicants, and for the implementation of affirmative recruitments programs aimed at this group. *Id.* at 660-62.

In 1975 plaintiffs instituted another action under the All Writs Act, 28 U.S.C. § 1651, seeking to clarify and preserve the effect of the district court's decree in light of litigation that had taken place in Massachusetts courts relating to the rights of cities and towns to grant statutory preferences to residents and veterans in appointing police officers. The court (Caffrey, C.J.) held that the prior decree did not displace these statutory preferences except insofar as the preferences must be applied within the several groups of applicants established by the decree. 386 F. Supp. 1281, 1285 (D. Mass. 1975). It urged that the parties agree upon a substitute consent decree and recommended they follow the one adopted in the fire case, *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir.), *cert. denied*, 421 U.S. 910 (1975). *Id.* at 1286.[4]

Thereafter the parties entered into a further consent decree, which the district court approved on July 7, 1975.

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[4] The consent decree finally agreed upon in the police case directed that four groups of eligible police officer candidates be established for each requisitioning police department:

> Group A consisted of minority applicants who failed discriminatory police entrance exams administered between 1968-1970 but who passed the 1972 interim exam and were otherwise qualified;
>
> Group B consisted of persons on three eligibility lists established in 1970-1971;
>
> Group C consisted of minority candidates not in Group A who passed the 1972 interim examination and were otherwise qualified;
>
> Group D consisted of all other persons who passed the 1972 interim exam and were otherwise qualified.

The consent decree in the fire case contained essentially identical groups of candidates, except it stated that the discriminatory exams targeted by the priority pools were administered from August 1968 to August 1971.

This decree mandated, among other things, certification of police applicants by methods essentially designed to facilitate the appointment in Boston and Springfield of one minority police officer for each white officer, and to expedite minority appointments by other appointing authorities on a ratio of one to three. The decree provided that these remedial measures should apply to any city or town with a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which time further certification would be made according to existing Massachusetts law.[5] The same parity target had already been set in the fire case.

On July 13, 1976, and on June 1, 1979, the district court approved and entered supplemental consent decrees that provided, among other measures, for continuation of the consent decree's method and ratios for certification, for further affirmative recruitment activities, and for monitoring of the civil service examination. They also discharged from further judicial supervision the police departments of cities and towns that had attained the parity target according to then current census statistics.

In the spring of 1981, the Boston Police Department initiated the reduction in force program. Thereafter, on April 6, 1981, plaintiffs filed a motion pursuant to Federal Rule Civil Procedure 60(b) to modify prior remedial orders. Following state funding legislation that led to a rescinding of the layoff program for fiscal 1981, plaintiffs requested that the court continue their motion until the program was reinstituted. In the first week of July 1981 the police department reactivated the layoff program, and on July 30, 1981, the district court (Caffrey, C.J.) heard plaintiffs' motion together with a similar motion in the fire case. On August 7, 1981, the opinion and order issued enjoining the Boston

[5] This parity target also applied to the state agencies enumerated in note 3 *supra*, relative to the percentage of minorities in the communities served by those agencies.

Police Department and Fire Department from reducing the percentage of minority officers below the level existing at the commencement of the layoff program.

The Fire Case

Unsuccessful black and hispanic applicants for appointment as City of Boston fire fighters and the Boston Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointing procedures, by the Boston Fire Department as well as by other appointing authorities.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. § 2000e *et seq.*, and the two actions were consolidated.

Following hearings, the district court made extensive findings, including findings that blacks represented approximately 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and that blacks and hispanics represented only 0.9 percent of the fire department's sworn personnel. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. at 514 (Freedman, J.). The court treated the hearings on plaintiffs' challenge to the fire fighters' entrance examination as a trial on the merits pursuant to Federal Rule Civil Procedure 65(a)(2) and found that plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 1968 through August 1971 were discriminatory. It also found that the word-of-

mouth recruitment policy resulted in racial discrimination, albeit unintentional. *Id.* at 510, 517 & 519-20.[6]

To afford "affirmative relief to remedy the present effects of past discrimination," the district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. It ordered that the remedial measures mandated by its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." *Id.* at 523.

We affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority hiring and that defendants had not demonstrated job relatedness. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). *See also Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Regarding the subject of an appropriate remedy, we noted that in the police case we had required the district court to institute remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Id.* at 1026. We approved the district court's decree, including the provision that the decree would remain in effect until any particular fire department attains "sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the lo-

[6] The district court concluded that defendants had not rebutted plaintiffs' prima facie case of discrimination established by the statistical disparity between the percentage of minority fire fighters in various fire departments and the relevant local population; it found that the entrance exams were not job related. *Boston Chapter, NAACP, Inc.* v. *Beecher et al.*, 371 F. Supp. 507, 517 (D. Mass. 1974), citing *Castro et al.* v. *Beecher et al.*, 459 F.2d 725, 732 (1st Cir. 1972).

cality." *Id.* at 1027. We reasoned that the district court's color-conscious relief did not violate the Constitution because it "goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," *id.*, and that "our society [is] well served by taking into account color in the fashion used and carefully limited in extent and duration . . . ." *Id.* We also rejected defendants' contention that the relief was barred by section 703(j)[7] of Title VII, 42 U.S.C. § 2000e-2(j). *Id.* at 1027-28.

Since the 1974 decree, the district court has entered several interim consent decrees and stipulations to effectuate its original order. These subsequent orders have set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting.

On April 7, 1981, upon commencement by the City of Boston of its force-reduction program, plaintiffs filed a motion to modify prior remedial orders. As in the police case, proceedings were continued until the consolidated hearing on

[7] Section 703(j) of Title VII provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j).

July 30, 1981. The injunction covering both departments issued on August 7.

The Facts

The statistics are undisputed. At the time of the original filing of these actions, racial discrimination had led to the virtual exclusion of blacks and hispanics from Boston's Police and Fire Departments. In 1970, only 65 of 2,805 police officers were black or hispanic, representing but 2.3 percent of the total. 459 F.2d at 728 n.1, 730. As of 1974, only 18 of 1,983 fire fighters were black or hispanic, representing only 0.9 percent of the total. 371 F. Supp. at 514. In contrast, the minority population of Boston was more than 16 percent in 1970, 459 F.2d at 728, and approximately 23 percent by 1974. 504 F.2d at 1020 n.4.

The district court's remedial orders in both cases have produced marked progress eliminating the present and continuing effects of past discrimination. Between 1974 and 1980, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were black or hispanic. As of July 6, 1981, 224 out of a total of 1,912 officers were black or hispanic; minority representation had risen to 11.7 percent. Between 1974 and 1980, the Boston Fire Department hired 553 fire fighters, of whom 248 (45 percent) were black or hispanic. On July 6, 1981, 248 out of a total of 1,690 fire fighters were black or hispanic; minority representation had increased in this department to 14.7 percent.

By 1980, however, the black and hispanic population of Boston had risen to between 29 and 30 percent, almost double the percentage of ten years prior.

Early in July 1981 both the Police and Fire Departments of the City of Boston commenced a systematic program of reduction in force. The city's program proposed six weekly layoffs, running from early July to mid-August. The police and fire departments planned to make these layoffs pursuant to the Massachusetts civil service statute, which requires

separations from service in reverse order of seniority. Mass. Gen. Laws Ann. ch. 31, § 39.

Such a layoff program was certain to cause a devastating reduction in the number of black and hispanic officers on both forces. The police department planned to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority,[8] which comprised 54.5 percent of the department's entire complement of minority officers. The fire department planned to lay off 207 officers, of whom 113 (54.6 percent) were black or hispanic; this constituted 45.6 percent of all minorities on the force. Unbridled operation of the force-reduction program would have dramatically cut minority representation in both the police and fire departments. By mid-August 1981 only 103 of 1,660 police officers would have been black or hispanic, and minority representation would have fallen from 11.7 percent to 6.2 percent. By mid-August only 135 of 1,483 fire fighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent.

Moreover, although as of July 30, 1981, city officials intended to proceed with only six waves of layoffs, there was no certainty that further force reductions would not occur.

The Decision Below

In its August 7, 1981 consolidated opinion, the district court made the specific findings outlined above. It then found, on the basis of the entire record in both cases, that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2 1/2 amount to

[8] The Supreme Court has approved of racial preferences granted to "minority" groups of divergent composition. *Compare United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (blacks only) *with Fullilove, et al.* v. *Klutznick, Sec. of Commerce, et al.*, 448 U.S. 448 (1980) (Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts). Throughout this opinion, our references to "minority" group members pertain to blacks and hispanics only. Whether a particular individual qualifies as a "minority" group member entitled to relief according to this definition has not been raised by the parties and we proffer no opinion on that question.

'new and unforeseen conditions' . . . ." *Castro et al.* v. *Beecher et al.*, 522 F. Supp. at 877. It ruled that, in light of the remedial objective of both consent decrees,

> namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, . . . if anything similar to Proposition 2 1/2 had been in effect at the time that the remedial decrees were entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Id.

The court also concluded that the denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and fire fighters, and would produce a "grievous wrong." *Id.* Accordingly, the Boston Police Commissioner and Fire Commissioner were enjoined from reducing, "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the program. *Id.* at 877-78. Neither the Police Commission nor the Fire Commisioner has appealed.

I. *THE COURT'S POWER TO REVISE THE CONSENT DECREE*

We initially determine whether the district court was empowered to modify its prior remedial orders because of the impending layoffs. At the outset we note that defendants settled both the police case, filed originally under sections 1981 and 1983, and the fire case, commenced under these sections as well as Title VII, by entering into remedial consent

decrees. They did so only after the liability issues had been extensively litigated, resulting in well-supported determinations at the district and circuit levels (with certiorari having been sought and denied in the fire case), that defendant's certification and recruiting procedures were discriminatory because they had produced an underrepresentation of blacks and hispanics in the police and fire departments, and that these procedures lacked justification in terms of job-relatedness. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424.

The first question is whether *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), bar the relief ordered because intentional discrimination was not proved. We find no bar. It is by no means clear that our decisions in the police and fire cases should have been different had they been decided after *Washington* v. *Davis* and *Arlington Heights*, but in any event the pattern of relief which the present modifications in the decrees seek to preserve was conclusively established prior to those decisions. Neither case stands in the way of the district court's modification of the consent decree. *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 919 (6th Cir. 1979); *Bolder* v. *Penn. State Police*, 73 F.R.D. 370, 371-72 (E.D. Pa. 1976).

We have carefully reviewed the original complaints, the language contained in the decrees, and all district and circuit court opinions in these cases. We can only conclude that the purpose of the decrees and the intervening orders was to eliminate the present and continuing effects of defendants' past discrimination. We reject appellants' contention that the original decrees and subsequent modifications limit relief to correcting features of the certification process found to have violated plaintiffs' constitutional rights as to hiring. These cases encompass the overall issue of shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees: gross discriminatory underrepresentation of persons in the fire and police departments who are not members

of the "prevailing white culture."[9] *Castro* v. *Beecher*, 459 F.2d 725, 729-31 (1st Cir. 1972); *see Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *cf. Evans* v. *Buchanan*, 582 F.2d 750, 768 (3d Cir. 1978) (in banc), *cert. denied*, 446 U.S. 923, *reh'g denied*, 447 U.S. 916 (1980).

The district court based its authority to reshape the consent decrees on its finding that the dramatic reduction in minority representation in these departments constituted a showing of a "grievous wrong evoked by new and unforeseen conditions," citing the Supreme Court in *United States* v. *Swift*, 286 U.S. 106, 119 (1932). *Swift* involved an antitrust *defendant* that sought to avoid its obligations pursuant to a consent decree due to changed market conditions. Perhaps a more apt standard was set out by the Supreme Court in *United States* v. *United Shoe Corp.*, 391 U.S. 244 (1968), wherein *plaintiffs* in an antitrust dispute sought revision of their remedy designed to produce "workable competition." *Id.* at 249. There, the Court held that modification was appropriate because time and experience had demonstrated that the decree had failed to accomplish its intended result. *Id. See also System Federation* v. *Wright*, 364 U.S. 642, 647 (1961). In any event there can be no question of the power of a court of equity, upon a sufficient showing, "to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift*, 286 U.S. at 114. Here, there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made.

Nor do we think that plaintiffs should be penalized for failing, in negotiating the decrees, to have foreseen the un

[9] Prior orders and stipulations in both cases have dealt with matters going beyond civil service certification measures, including employment of provisional employees, recruiting, appointment targets, rejection of applicants, the effects of statutory preferences for veterans and local residents, mental and physical testing, and firing. *See, e.g.*, 371 F. Supp. at 521-22; 365 F. Supp. at 661-62.

precedented change in state and local fiscal policy resulting in the extensive layoff programs. We agree with the district court that, had the parties anticipated any measure such as Proposition 2 1/2, they would have incorporated some provision addressing its potential impact into the decrees. Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees.

The Sixth Circuit's treatment of a virtually identical layoff situation in *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), lends considerable support to our conclusion that modification was within the court's power. In *Brown*, findings of prior illegal discrimination by the Toledo Fire Department formed the predicate of a consent decree entered into by the city, which set as a goal that the city "achieve within 5 years a fire department which reflected the racial composition of the city as a whole." *Id.* at 555. The Sixth Circuit upheld the district court's authority to order the same type of modification of the original decree as in this case, reasoning that the language in the decree, although silent as to the effect of layoffs, and the circumstances surrounding the entry of the decree, compelled the conclusion that the "city agreed that it had a constitutional duty to eliminate discrimination in the hiring of firefighters." *Id.* at 562-63. The *Brown* court distinguished its denial of similar relief in *Youngblood* v. *Dalzell*, 568 F.2d 506 (6th Cir. 1978), because in *Youngblood*, unlike *Brown*, there had been no finding of prior discrimination; the original decree contained language expressly denying that the Cincinnati Fire Department had discriminated in its past hiring practices. *Brown* v. *Neeb*, 644 F.2d at 561 & n.18.

Here, as in *Brown*, the defendants entered into consent decrees upon "capitulating to judicial findings of past discrimination." *Brown* v. *Neeb*, 644 F.2d at 562 & n.20; *Boston Chapter, NAACP, Inc.* v. *Beecher*, April 17, 1975 Interim Consent Decree (fire case), App. at 90-91; *Castro* v. *Beecher*, 365 F. Supp. at 656. Both decrees contain language

that warrants concluding that the certifying and appointing authorities are under an affirmative duty to integrate the police and fire departments until the percentage of blacks and hispanics in both departments approximates that of the general population.[10] In addition, neither decree contains any exculpatory language as in *Youngblood.* And, as in *Brown,* if the district court undertook no modification, the layoffs would have eroded significantly, if not completely destroyed, the affirmative action progress made to date. *See Brown* v. *Neeb,* 644 F.2d at 560. Under these circumstances, we conclude that the district court had the authority to modify the consent decrees in the light of new and unforeseen conditions.

We next address the issues of whether the relief ordered was proper and constitutional.

II. *THE COURT ORDER VERSUS THE MASSACHUSETTS SENIORITY STATUTE*

To implement its order prohibiting the Boston Police and Fire Departments from reducing the current level of minority representation, the district court required the maintenance of separate minority and nonminority lists with respect to seniority, reemployment and reinstatement. To this extent, therefore, the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute, Mass. Gen. Laws Ann. ch. 31, § 39.[11] Most of the cases dealing with the inherent con-

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[10] *See, e.g.,* June 27, 1975 Consent Decree (police case), App. at 122-23; April 17, 1975 Interim Consent Decree (fire case), App. at 93.

[11] Mass. Gen. Laws Ann. ch. 31, § 39 provides in pertinent part:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of serv-

flict between affirmative action programs and vested seniority rights have concerned private employers and Title VII. And, until recently, the dispute has mainly centered on hiring and promotion.

There are three Supreme Court cases that focus on the problem of seniority rights and discrimination against minorities. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *American Tobacco Co., et al.* v. *Patterson, et al.*, 50 U.S.L.W. 4364 (April 5, 1982). In *Franks* the district court had found that the employer had discriminated in making hiring, transfer, and discharge decisions, all of which occurred after July 2, 1965, the date on which the prohibition against racial discrimination under Title VII took effect as to private employers. *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 751, 758 n.10. The Supreme Court held that section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)[12] did not "modify or restrict relief other-

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ice, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

[12] Relevant portions of § 703(h) of Title VII provide:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h).

wise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved," *id.* at 761-62, and "that class-based seniority relief for identifiable victims of illegal hiring discrimination was a form of relief generally appropriate under § 706(g)." *Id.* at 779; *accord, Teamsters* v. *United States,* 431 U.S. at 346-48; *EEOC* v. *American Tel. & Tel. Co.,* 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *see Ass'n Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256, 278 (2d Cir.), *cert. denied,* 102 S. Ct. 397 (1981); *Guardian's Ass'n of New York City* v. *Civil Service,* 633 F.2d 232, 249-54 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 3083 (1981); *Chance* v. *Board of Examiners & Bd. of Educ.,* 534 F.2d 993, 1007 (2d Cir. 1976) (*reh'g in banc*), *cert. denied,* 431 U.S. 965 (1977).

In *Teamsters* the Court did not retreat from the rule set forth in *Franks,* but dealt instead with the effect of section 703(h) on awarding retroactive seniority to redress prior discrimination that had occurred both before and after the effective date of Title VII. The district court in *Teamsters* had found that the employer had discriminated by implementing hiring, assignment and promotion policies that caused black and hispanic employees to occupy the lower paying and less desirable jobs. 431 U.S. at 329-31. As to those plaintiffs claiming that they had been discriminated against after the effective date of Title VII, the Court stood firm on its *Franks* ruling. *Id.* at 347. But the Court denied relief to those plaintiffs alleging discrimination that occurred prior to the effective date of the Act and held that an "otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.* at 353-54.

The most recent case, *American Tobacco Co.* v. *Patterson,* 50 U.S.L.W. 4364, dealt with the question whether § 703(h) applied to seniority systems adopted after the effective date of Title VII, July 2, 1965. After an exegesis of the statutory history of Title VII, the Court concluded that § 703(h) im-

munizes a bona fide seniority system whenever adopted unless intentional discrimination was proven. *Id.* at 4367-68. Compare p. 13 *American Tobacco Co.* did not explicitly overrule the holding of *Franks* that § 703(h) does not bar appropriate relief if an illegal discriminatory practice occurring after the effective date of the Act is proved.

We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. The original consent decrees in the cases before us, decided long before the Supreme Court cases, were directed at such independent violations, the use of discriminatory certification examinations. None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Two recent Second Circuit cases are analogous to our situation. *Guardians Ass'n* v. *Civil Service,* 633 F.2d 232 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 3083 (1981), was an action brought under Title VII, Title VI and 42 U.S.C. § 1981 by black and hispanic members of the New York City Police Department, alleging that layoffs carried out pursuant to a last hired, first fired plan were discriminatory because the Department's entry examinations administered during the years 1968 to 1970 were discriminatory, and that but for such discrimination plaintiffs would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired. The court upheld the district court's findings that the entry examinations were discriminatory and held that the use of such tests as late as 1974 violated Title VII. It held that § 703(h) did not "immunize post-Act hiring on the basis of an eligibility list reflecting performance on pre-Act discriminatory examinations." *Id.* at 253. In *Association Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 3, 1982)

(Nos. 81-373, 81-374), the Second Circuit affirmed its holding in *Guardians* that a municipality could be held liable under Title VII for post-Act hiring based on a pre-Act discriminatory hiring list. *Id.* at 272-74.

It is now settled that remedies to right the wrong of past discrimination may suspend valid state laws. *Carter* v. *Gallagher*, 452 F.2d 315, 328 (8th Cir. 1961) (*reh'g in banc*), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Mississippi*, 339 F.2d 679 (5th Cir. 1964); *United States* v. *Duke*, 332 F.2d 759 (5th Cir. 1963). *See generally* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1557-60 (1975).

We emphasize that the district court orders do not completely nullify the seniority statute. Nor do they mandate the firing of any particular employees. The orders allow the statute to be followed so long as the level of minority representation is not reduced beyond that which prevailed at the time the personnel reductions began. The order was designed to operate within the framework of the statute, although modifying it to the extent necessary to preserve the integration already achieved.

We hold that the court's orders prevail over the Massachusetts seniority statute.

III. *THE CONSTITUTIONALITY OF THE ORDERS*

Appellants argue that the orders discriminate against nonminorities and thus are unconstitutional.[13] We first define the issue. This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without

[13] As a threshold matter, we find that appellants did preserve the reverse discrimination argument for appeal by suggesting the applicability of the reasoning in *Chance* v. *Board of Examiners & Bd. of Educ.*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), at the July 30, 1981 hearing before Judge Caffrey.

regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination.

We turn to the Supreme Court cases, in addition to those already discussed, bearing on the issue. The first case is *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976), which held that section 1981 protects whites as well as blacks from racial discrimination in private employment.

Next came *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). A divided court upheld so much of the judgment of the Supreme Court of California declaring the University's special admission program based on racial quotas unlawful. *Id.* at 270-71. It reversed, however, that portion of the California court's judgment enjoining the University from according any consideration to race in its admission process. *Id.* at 272.

United Steelworkers of America v. *Weber*, *443 U.S. 193, reh'g denied*, 444 U.S. 889 (1980), comes closer to our problem. In *Weber* the Court held that Title VII does not bar voluntary, private affirmative action undertaken by an employer in collaboration with a union, even when the plan is racially preferential or accomplished through a quota, so long as the plan is directed to eliminating "conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 208-09. Although the court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action," *id.* at 208, it noted that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." *Id.*

The fourth Supreme Court case that bears, albeit tangentially, on the issue is *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). This case upheld the power of Congress to require in a congressional spending program that "10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from

businesses owned and controlled by members of statutorily identified minority groups." *Id.* at 453.

Although these decisions issued from a sharply divided court and were marked by separate concurrences and dissents, we think it is now firmly established that remedial relief for the effects of past discrimination need not be color-blind and that the use of minority-conscious percentage goals and quotas to overcome the present and ongoing effects of past discrimination is constitutionally permissible. *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1335 (5th Cir. 1980) and cases cited therein. We also think that *Weber* implicitly approves the use of such remedies in sections 1981 and 1983 cases as well as Title VII cases. *See Setser* v. *Novack Inv. Co.*, 657 F.2d 962, 966-67 (8th Cir. 1981) and cases cited therein.

None of the other Supreme Court cases, however, involve public employment nor address directly the situation before us; the conflict between a last hired, first fired seniority system and court orders seeking to maintain some semblance of racial balance in municipal Police and Fire Departments. There is no blinking the fact that there is significant difference between hiring and promoting in accord with a race-conscious ratio and insulating from discharge a percentage of employees because they are members of a minority group. In the former situation, there is only a postponement of expectations; in the layoff situation, employees with greater seniority lose their jobs. *See Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 n.12 (6th Cir. 1979); Judge Skelly Wright, *Color-Blind Theories and Color Conscious Remedies*, 47 U. Chi. L. Rev. 213, 238-40 (1980).

We do not think the issue can be resolved by simply following the Title VII cases and awarding constructive seniority to those minority members of the departments that can show that they were discriminated against by the entry examinations given in 1968-1970. This is not an action for damages. The relief sought originally was not for individuals, but to correct a condition of racial imbalance. We do not know the exact effect the award of constructive seniority to the iden-

tifiable victims of the past discrimination would have on the minority percentages of the departments. Considering, however, that more than ten years have passed, we do know that such a limited remedy would result in minority ratios far below that set by the district court.[14]

It must be stressed that the orders here do not require the continuation of the affirmative action programs by the hiring of minorities and the firing of whites. All they do is preserve the status quo at a 14.7 percent minority ratio for fire fighters and an 11.7 percent for policemen. Against a background of a present 30 percent minority population in Boston, this hardly can be deemed overreaching. Nor do we think it can fairly be characterized as "unnecessarily trammeling" the interests of the whites. *United States* v. *Weber*, 443 U.S. at 208. The fact of past discrimination agreed to in both cases constitutes a "compelling need" for a minority-conscious remedy. The proper test is one of reasonableness. *See Morgan, et al.* v. *O'Bryant, et al.*, Nos. 81-1561, 1617, 1618, 1619, and 1646, slip op. at 10-11 (1st Cir. February 17, 1982). The orders of the district court meet the test of reasonableness. They were necessary to prevent the departments from regressing to the state of precipitous racial imbalance that prevailed at the commencement of this litigation more than ten years ago.

We are acutely aware that some white policemen and fire fighters who, understandably, regard the seniority system as

[14] In response to an inquiry at oral argument, we have been informed that the earliest seniority date of minority police officers laid off is June 1980, and the earliest seniority date of laid-off white police officers is December 30, 1970. We have also been told that of the 258 police officers laid off, 34 are minority and that if it were not for the order of the district court, 130 minority officers, 126 white officers, and 2 oriental officers would have been laid off. As a result of the order, 81 minority officers were recalled so as to maintain the 11.7% minority representation in the department. On a percentage basis, the district court's order means that a little more than 13% of those laid off are members of the minority group.

an inalienable right and who have been innocent themselves of any discrimination will lose their jobs, at least temporarily.[15] We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities. This is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments.

An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent. We are concerned here not with simply redressing the rights of individuals who suffered racial discrimination; the issue is whether the progress made to date in integrating the departments will be preserved. As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F. Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable

[15] If a fire fighter or police officer with permanent civil service status is laid off as a result of a reduction in force, that individual will be placed on reemployment lists by the Director of Personnel Administration. A reemployment list establishes for a laid-off fire fighter or police officer the right to be certified to all municipalities for a period of two years from his layoff, ahead of all other persons eligible for appointment as police officers or fire fighters. Mass. Gen. Laws Ann. ch. 31, § 40. In addition, a police officer or fire fighter has the right to be reinstated to a vacancy within the department from which he was laid off for five years after the date of his termination — again with preference over all other eligible applicants. Mass. Gen. Laws Ann. ch. 31, § 39.

The probable extent of recalls in both departments is not yet clear, although some evidence does exist that in fact reinstatement of at least some of the laid-off employees has taken place or will occur.

result is poor police and fire protection for those who need it most.

> The argument that police need more minority officers if not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

Detroit Police Officer's Ass'n v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979).

It is significant that the only circuit case directly on point, *Brown* v. *Neeb*, 644 F.2d at 564, held: "To the extent that the seniority system is an obstacle to the city of Toledo's duty to eliminate past discrimination the district court can set it aside."

We find no constitutional bar. It is now accepted that minority-conscious quotas can be used as a tool to prevent discrimination and to advance integration of the work force in hiring and promotion situations. The imposition of constructive seniority to offset the effects of a last hired, first fired system has been used with increasing frequency since *Franks* in Title VII cases. While the orders place a relatively greater share of the burdens of the layoffs upon nonminorities, this does not constitute "reverse discrimination." The layoffs here were bound to cause undeserved injury in any event. While seniority was the normal way to decide who must go first, there is nothing magical about seniority, and here common sense suggests that it should be tempered by other entirely rational considerations so that the racial equity achieved at considerable effort in the past decade not be erased. In *Bakke*, not an employment case, the Supreme Court refused to enjoin the University from giving any con-

sideration to race in its admissions process. It is a simple fact that discrimination against blacks and other minorities was long accepted and condoned in this country. To a minority police officer or fire fighter hired within the last ten years, the imposition of a rigid last hired, first fired seniority system would only mean that once again the dominant white culture had protected its own kind at the expense of blacks and hispanics. If the evil of racial discrimination is to be fought openly, we must not allow ourselves to be caught in a semantic web of aphorisms such as "reverse discrimination" that in the final analysis serve only to perpetuate the discrimination of the past.

We rule that the district court had the equitable power to modify the consent decrees, that the Massachusetts statutory last hired, first fired seniority system is not insulated from the court's orders, and that the orders are not unconstitutional.

Affirmed.

United States District Court
District of Massachusetts.

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action No. 72-3060-C

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

CITY OF BOSTON, ET AL.,
DEFENDANTS.
Civil Action No. 73-269-C

ORDER

August 7, 1981

CAFFREY, Ch. J.

This matter having come on for hearing on plaintiffs' motion to modify prior remedial orders; and the Court having considered the prior proceedings had herein, further evidence regarding proposed reductions in force affecting the Fire Department of the City of Boston, the parties' briefs and

the arguments of counsel; and the Court having found that a material change in circumstances—namely, the effective and proposed reductions in force—would nullify the Court's prior remedial orders and frustrate the intent of those orders; and the Court having found that modification of those prior remedial orders through entry of the within order is necessary to prevent that consequence, it is therefore, ORDERED, ADJUDGED AND DECREED as follows:

Exhibit 1

1. The defendant Fire Commissioner of the City of Boston is hereby restrained and enjoined from reducing, pursuant to any departmental or city program of reductions in force of firefighters on acount of lack of funds or abolition of position, the percentage of minority firefighters in the City of Boston Fire Department below the level of 14.7 percent of all firefighters.

2. For the purpose of implementing this order, the defendant Fire Commissioner of the City of Boston shall establish and maintain separate seniority lists of firefighters, one for minority firefighters and one for non-minority firefighters and shall use such separate lists in implementing any program of reductions in force on account of lack of funds or abolition of positions. Within each separate seniority list, the seniority of each firefighter shall be computed pursuant to statute, M.G.L. c. 31, § 33.

3. As firefighters in the Boston Fire Department are separated from their positions because of lack of funds or abolition of positions, the defendant Fire Commissioner may terminate firefighters according to strict seniority until the reduction in force results in a reduction of the percentage of minority firefighters below 14.7 percent. At that point, the Commissioner shall utilize separate seniority lists for minor-

ity and non-minority firefighters and shall terminate the least senior firefighters from each of the two lists according to a mathematical ratio so that the percentage of minority firefighters at no time falls below 14.7 percent. Nothing herein shall disturb application of Massachusetts statutory preferences; provided that such preferences are applied solely within the separate seniority lists.

4. In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

5. For the purpose of continuing the implementation of this Court's prior orders, the defendant Personnel Administrator is ordered to place the names of all City of Boston firefighters who are laid off for lack of funds or abolition of position on the Civil Service re-employment and reinstatement lists in the order in which they are laid off. Reinstatement and re-employment of firefighters on such lists shall be accomplished by the Personnel Administrator and by the Fire Commissioner in reverse order of such layoffs and in a manner so that the percentage of minority firefighters does not fall below 14.7 percent. The Personnel Administrator, upon receipt of any requisition for hiring, shall certify names from such lists prior to certifying names from any other list.

6. The parties are instructed to confer and negotiate with respect to any further practices and procedures necessary and appropriate for the implementation of the provisions of this order.

[SIGNED]

Andrew A. Caffrey, Ch. J.

United States District Court
District of Massachusetts.

PEDRO CASTRO, ET AL.,
PLAINTIFF,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action Nos. 70-1220-C, 74-2982-C

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS.
Civil Action No. 72-3060-C

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

CITY OF BOSTON, ET AL.,
DEFENDANTS.
Civil Action No. 73-269-C

OPINION

August 7, 1981

CAFFREY, Ch. J.

These four cases, all of which have long since gone to judgment, are before the Court on motions filed by the plaintiffs in each case to modify prior remedial orders. All four cases raise substantially the same legal issue, i.e., may the City of Boston in conducting reductions in force in the Boston Police and Fire Departments decide which police officers and which firemen to terminate on the basis of seniority as directed by M.G.L. c. 31 § 39, or must the City of Boston maintain the percentage of minority representation existing as of July 6, 1981 by persons who are either black or hispanic.

The past history of this litigation may be summarized as follows: The police case was begun and assigned to the Honorable Charles E. Wyzanski, Jr., who tried the case and entered a judgment, after which an appeal was taken to the First Circuit and the Court of Appeals filed an opinion giving directions for further proceedings by Judge Wyzanski. Judge Wyzanski made additional rulings and then subsequent litigation in the police case was assigned to and handled by the undersigned, including the monitoring of remedial measures. (For further background information see the undersigned's opinion of January 7, 1975 reported in 386 F. Supp. 1281.)

For present purposes suffice it to say that this action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston Police officers. Plaintiffs claimed racial discrimination in the recruitment and certification practices initiated by the Massachusetts Civil Service Commission and implemented, through appointment procedures by the police forces of the City of Boston, other cities and towns, and other appointing authorities subject to Massa-

chusetts Civil Service regulations. Following trial, Judge Wyzanski made extensive findings, including findings that, in 1960, blacks represented 9 percent of the population of Boston and but 2 percent of its police force and, in 1970, 16.3 percent of the population and but 3.6 percent of the police force. Judge Wyzanski also found that the Massachusetts Civil Service Police Entrance Examination discriminated against minorities who did not share mainstream white culture. Judge Wyzanski held that plaintiffs had been discriminated against. 334 F. Supp. 943 (1971).

Appeal followed to the First Circuit. The Court of Appeals held that the civil service examinations were racially discriminatory. The Court of Appeals remanded the case with instructions that the district court enter a remedial order providing for implementation of a substantially job-related examination and providing for certification of black and hispanic applicants on a priority basis to be determined, under guidelines recommended by the Court of Appeals, by the District Court. The Court of Appeals insisted that relief "is to be more than token." 459 F.2d 725, 737 (1972).

On remand Judge Wyzanski approved and entered a comprehensive consent decree, finding that it was "just, reasonable and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective non-discriminatory, dedicated, and honorable police forces...." 365 F. Supp. 655, 660 (1973). The remedial order provided, among other measures, for the establishment of civil service certification priority pools consisting of certain black and Spanish-surnamed applicants, and for the implementation of affirmative recruitment programs for the purpose of recruiting black and Spanish-surnamed police applicants. *Id.* at 660-662 (1973). Immediately prior to approval of the consent decree, Judge Wyzanski had issued an opinion exhorting the parties to reach agreement on the provisions of the decree, in the course of which he observed:

> "there is a *prima facie* presumption that on a job-related examination which is reasonably set to meet merely the requirements and not something above requirements of a police patrolman's job, the percentage of successful black and Spanish speaking persons who would choose to be patrolmen and who also meet the requirements of the job would nearly approximate the percentage of blacks and Spanish speaking persons in the population of the Commonwealth." *Id.* at p. 655.

In 1975 plaintiffs brought an action pursuant to the All Writs Act for the purpose of clarifying and preserving the effect of the prior consent decree in light of proceedings which had taken place in the Massachusetts Superior and Supreme Judicial Courts upon applications by certain Massachusetts cities and towns to establish the right to appoint police officers in accordance with certain statutory preferences. The action was assigned to the undersigned, who subsequently has supervised all aspects of the two consolidated police cases, including holding that statutory preferences were not displaced by the prior consent decree except to the extent that the preferences must be applied within the several groups established by the priority appointment procedures contained in the consent decree. I also further requested the parties to arrive at a substitute consent decree and recommended the remedy adopted in *NAACP* v. *Beecher*, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1975). 386 F. Supp. 1281 (1975).

Thereafter, all parties entered into a consent decree, approved and entered by the Court on July 7, 1975. This consent decree provides, among other measures, for the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and hispanic applicants and for procedures for administration and

reporting with respect to police entrance examinations. This decree required certification of police applicants by methods in essence designed to facilitate the appointment by Boston and Springfield of one minority policeman for each white policeman, and to facilitate the appointment by other appointing authorities on a ratio of one to three. The decree also provided that the method and ratios of certification provided for by the decree shall apply to all cities and towns which have a minority population of one percent or more until any such city or town "achieves a complement of minorities commensurate with the percentage of minorities within the community," at which point further certification will be made in accordance with existing Massachusetts law. This parity target had been established by the Court in the *NAACP* v. *Beecher* decree to which I previously directed the parties.

On July 13, 1976, the writer approved and entered a supplemental consent decree. This decree contained further administrative procedures for monitoring the continuing implementation of prior decrees. This decree also exempted from further application of the method and ratios of certification contained in the July 7, 1975 consent decree the police departments of 81 cities and towns which had attained parity of the percentage of blacks and hispanics in police service with the percentage of blacks and hispanics in municipal population according to then current census statistics. Ninety one cities and towns plus the MBTA, MDC and Capitol Police forces remain subject to the decree.

On June 1, 1979 I further approved and entered an agreement as to the May, 1978 examination which provided, among other measures, for the continuing applicability of the method and ratios for certification provided for by the 1975 consent decree and for further recruitment activities and monitoring of the civil service examination.

As found in prior proceedings, in 1970 the Boston Police Department employed 2805 officers. Sixty-five of these were black or Spanish-surnamed, representing 2.3 percent. 459 F.2d at 728, 730. At the same time, the population of the city was 16.3 black. *Id.* at 728.

Since 1973, as a result of implementation of this Court's orders, Boston has increased the representation of minorities in the Police Department from 2.3 percent to 11.7 percent. Pursuant to the methods, ratios and procedures provided for by prior decrees, the Boston Police Department has hired, between 1974 and the present, 451 police officers, of whom 243 (53.88 percent) have been white and 208 (46 percent) have been Black, Spanish-surnamed and other minorities. However, the minority population of Boston has increased during the intervening decade to 30 percent. The percentage of black and hispanic officers in the Police Department, therefore, remains far below the percentage of minorities in the city and the parity level which the Court's prior remedial orders were designed to achieve.

Against this background, the City of Boston presently plans, and has begun to implement, massive reductions in work force in the Boston police and fire departments for alleged reasons of fiscal austerity.

I find on the basis of stipulations entered into by the parties on July 29, 1981, that reductions in force now being conducted, and scheduled for completion on August 18, 1981, would reduce minority representation in the police force to 6.2%, contrasted with the 11.7% as of July 6, 1981. Similar reductions in the Fire Department, to be completed on August 12, 1981, would leave a 9.1% minority representation, as compared with the 14.7% level of July 6, 1981.

The litigation involving the members of the Fire Department has followed a substantially similar course down through the years and is described with far greater specific-

ity than is necessary for present purposes in an opinion filed by Judge Freedman on February 8, 1974, reported in 371 F. Supp. 507 (1974). The firemen's cases were later transferred from Judge Freedman to the Honorable John J. McNaught, in whose temporary absence the firemen's cases are also being handled by the undersigned.

Given the foregoing, it should be noted that contrary to specious arguments for counsel for the state respondents, this motion does not constitute the filing of a new complaint, does not warrant respondents filing an answer, and does not require a new trial. Stating the matter affirmatively, this motion is a request that this Court modify a remedial decree which it has been monitoring for many years. The Court clearly has power to do so on the basis of both Rule 60(b)(6) of the Federal Rules of Civil Procedure and under its inherent equitable power. It was so ruled by the Supreme Court of the United States in *United States* v. *Swift*, 286 U.S. 106 (1932) where (at page 115) the Supreme Court stated:

> A Court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

The standard to be followed by a district court in deciding whether and when to exercise its inherent right to modify a remedial decree was also stated by the Supreme Court in *United States* v. *Swift* (at page 119) where the Court told us:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.

I rule on the basis of the entire record of these cases from 1970 to date:

1. that the orders previously entered in all of these cases were decreed after years of litigation;

2. that the massive firings claimed by municipal authorities to be a result of the voters enacting Proposition 2½ amount to "new and unforeseen conditions" within the *Swift* ruling; and

3. that if this Court fails to modify the decree, as requested by plaintiffs' motions, then a grievous wrong would be produced by this Court's non-action, i.e., a refusal to amend the remedial order would allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970.

4. that it is obvious from the opinion of the United States Court of Appeals for the First Circuit that using M.G.L. c. 31, § 39 to *de facto* reverse all of the results granted over the past 11 years would not be tolerated by that Court. *Cf. Brown* v. *Neeb*, C.A. No. 72-282, July 3, 1980 (N.D. Ohio); *aff'd* March 3, 1981 (6th Cir.).

It should be noted in view of the argument by various respondents that the earlier remedial decrees do not talk about terminations, that the argument first of all is factually fallacious in that both Judge Wyzanski and this writer have made reference to terminations, see Section IV, para. 5(e), Consent Decree by Wyzanski, J., 365 F. Supp. 655, 662 (1973), and para. 19(b), Consent Decree by Caffrey, Ch. J., unreported, July 7, 1975. Secondly, and more importantly, it is beyond argument that, given the nature of the remedial decrees directed by the Court of Appeals, and given the objective thereof, namely bringing minority representation up to a level approximating the percentage of the total population which the minorities represent in the community, that if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both

departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

Accordingly, I rule that an order should enter granting plaintiffs' motions to modify prior remedial orders and enjoining respondents from reducing the percentage of black and hispanic police officers on the City of Boston police force below the 11.7% of July 6, 1981, and enjoining the City of Boston from reducing the number of black and hispanic members of the Fire department below the 14.7% of July 6, 1981.

[SIGNED]

Andrew A. Caffrey, Ch. J.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES.

42 U.S.C. 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CIVIL RIGHTS ACT OF 1964:

Section 703(a), 42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000(e)-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful em-

ployment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Section 703(j), 42 U.S.C. § 2000(e)-2(j)

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706(g), 42 U.S.C. § 2000(e)-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back

pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

MASSACHUSETTS GEN. LAWS CH. 31

Section 33

For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original

employment; provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty for which compensation was paid pursuant to chapter one hundred and fifty-two, provided that the employee notifies the appointing authority, in writing, not later than six months after the final payent of compensation aforesaid that he is ready, willing, and able to do his former work and files with said appointing authority a certificate of a registered physician that he is able to perform the duties of his position in an efficient manner, and is restored to the payroll.

If, as a result of a reinstatement made pursuant to section forty-six, a person is restored to employment in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under such reinstatement, but upon continuous service in such unit for three years or twice the length of his absence from the payroll, whichever is greater, his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.

If the employment of such full-time employee is changed through an original or promotional appointment or transfer from one departmental unit of the commonwealth to another under the same appointing authority, or from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the

employment of such full-time employee is changed through an original or promotional appointment from one department unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.

If the employment of such full-time employee is changed by transfer from one departmental unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to a city or town, the length of service of such employee shall be computed in the following manner: (1) if the transfer was made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer; (2) if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer.

The length of service of a permanent employee appointed on less than a full-time basis shall be computed from the date of such appointment, without regard to absences from the payroll which were not voluntary on the part of such employee. Regardless of actual length of service, permanent

employees appointed on less than a full-time basis shall, for purposes of determining seniority, rank below all full-time permanent employees.

Section 39

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as suffi-

cient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

SCHEDULE OF CITATIONS TO OTHER STATES' SENIORITY STATUTES

Ala. Code § 36-26-26 (1975)

Alaska State. § 39.25.150(15) (1981)

Ariz. Rev. Stat. Ann. § 41-483(14) (1974)

Ark. Stat. Ann. § 19-1615 (1968)

Del. Code Ann. tit. 29, § 5928 (1979)

D.C. Code Ann. § 1.625.2(a)(1) (1981)

Fla. Stat. Ann. § 110.227(3)(b) (1982)

Ill. Ann. Stat. Ch. 127 § 63b108b 13 (1981)

Ind. Code Ann. § 4-15-2-32 (1982)

Iowa Code Ann. § 400.28 (1976)

Kan. Stat. Ann. § 75-2948 (Supp. 1979)

Ky. Rev. Stat. § 18.210(14) (1980)

Mo. Ann. Stat. § 36.360 (1969)

N.J. Stat. Ann. § 11:13-2 (1976)

N.Y. Civil Service Law § 80(1) (1982)

Ohio Rev. Code Ann. § 124.32 (Supp. 1981)

Okla. Stat. Ann. tit. 74, § 833 (Supp. 1981)

Pa. Stat. Ann. tit. 71, § 741.802 (1962)

R.I. Gen. Laws § 36-4-37 (1969)

S.C. Code § 47-763 (1962)

Tenn. Code Ann. § 8-30-320 (1980)

Utah Code Ann. § 67-19-18(4) (Supp. 1981)

Wis. Stat. Ann. § 16.28(2)(a) (1972)

Wyo. Stat. § 15.1-296 (1957)

United States Court of Appeals For the First Circuit

Misc. No. 81-8053.

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS-APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS-APPELLANTS.

MEMORANDUM AND ORDER

Entered August 31, 1981

Intervenor Local 718 of the Boston Firefighters' Union has not met the applicable standards for a party seeking a stay of an injunction pending appeal. *Martinez Rodriguez* v. *Jimenez*, 537 F.2d 1, 2 (1st Cir. 1976) (per curiam).

(1) Local 718 has not made a "strong showing that [it] is likely to succeed on the merits of the appeal." *Id.* Indeed, the law is unsettled as to the proper solution when economic conditions force layoffs following the institution of affirmative action programs to remedy past discrimination. *Compare*, *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), *with Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

(2) We do not deny that those non-minority firefighters who may be laid off as a result of the August 7 order will suffer in-

jury. However, since minority firefighters laid off under strict seniority are equally harmed, Local 718 has "failed to demonstrate irreparable harm during the pendency of this appeal that would substantially outweigh the injury to the plaintiffs." *Martinez Rodriguez, supra* 537 F.2d at 2.

(3) Intervenors assertion at page 7 of their motion that "[t]here is a lack of substantial injury to the other parties" is disingenuous. Any firefighter who loses his job will suffer injury whatever the color of his skin.

(4) The union claims that the public interest will not be harmed by the granting of a stay because the percentage of minority firefighters, even if the layoffs occur, will be higher than it was when plaintiffs originally brought suit. The local also stresses the importance of avoiding racial divisiveness. Plaintiffs counter that the risk of increased racial tension resulting from the August 7 order is speculative and suggest that the union might have some role in the creation of any such antagonism. We are not unmindful that however any necessary reduction is accomplished, those who lose their jobs will suffer. These are difficult times. But on balance, we believe that the public interest in maintaining recent gains in minority employment for a brief period pending appeal, outweighs the speculative harm of any temporary increase in racial tensions. We further note that even the 14.7% minority figure which the district court order requires to be maintained is less than the proportion of minority population in the city of Boston. See, *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1020 n.4 (1st Cir. 1974).

The petition for stay is denied.

By the Court:

[SIGNED]

Dana H. Gallup
Clerk.

Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-185, 82-246 and 82-259

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOINT APPENDIX.

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PETITION FOR CERTIORARI IN NO. 82-185 FILED AUGUST 2, 1982 AND IN NOS. 82-246 AND 259 FILED AUGUST 9, 1982
CERTIORARI GRANTED NOVEMBER 1, 1982

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Stipulation and agreement, April 3, 1979 35a

Order, March 12, 1979 36a

Plaintiffs' motion to modify prior remedial orders 42a

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THE POLICE CASES
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Consent decree, June 27, 1975 52a

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Agreement as to May, 1978 examination, May 18, 1979 75a

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ABRIDGED DOCKET ENTRIES*

THE COURT OF APPEALS

August 31, 1981	Memorandum and Order (Coffin, Ch. J. & Bownes, J.) denying the petition for stay.
May 11, 1982	JUDGMENT: (Campbell, Bownes and Breyer) affirming the judgment of the district court. Opinion by Bownes, J.

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* The proceedings below evolve from four (4) separate actions. Private Plaintiffs filed an action pursuant to 42 U.S.C. §§ 1981 and 1983 asserting racial discrimination in firefighter hiring in the Commonwealth of Massachusetts (No. 72-3060-F) and the United States of America filed a suit under Title VII, CRA of 1964 claiming racial discrimination in Massachusetts Civil Service procedures and Boston Fire Department hiring practices (No. 73-269-F). Other private plaintiffs filed an action pursuant to 42 U.S.C. §§ 1981 and 1983 alleging racial discrimination in police hiring procedures in Massachusetts (No. 70-1220-W) and a later action pursuant to 28 U.S.C. § 1651 (No. 74-2982-C), the All Writs Act. The firefighter cases were consolidated in 1973 and this police and firefighter litigation continued on separate courses until both lines converged in April, 1981 and now proceed on a consolidated basis for purposes of review of the August 7, 1981 modifications.

THE DISTRICT COURT

The Fire Cases

No. 72-3060-F

1972

October 4,	Complaint filed
October 25,	Defts' answer filed c/s
November 2,	Answer of deft. James H. Kelley filed.

1973

July 18,	FREEDMAN, J. ORDER ENTERED. "As a result of the pretrial conference held on 7/17/73, it is hereby ORDERED 1) Motion to consolidate cases 73-269* and 72-3060 is allowed. . ."

1974

February 8,	FREEDMAN, J. OPINION ENTERED.
February 11,	FREEDMAN, J. ORDER ENTERED . . . decree entered by court on February 8 is amended.
February 13,	Director and Commissioners of Civil Service Notice of Appeal filed.

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*The United States of America filed its complaint on January 24, 1973. The City of Boston filed its Answer on February 13, 1973 and the Massachusetts Civil Service Commission filed its Answer on April 19, 1973.

March 13, ... FREEDMAN, J. Re: proposed interim reporting order — "Allowed."

September 18, ... Opinion received from the Court of Appeals entered. . .Affirmed.

1975

April 17, ... FREEDMAN, J. Re: interim consent decree— "APPROVED AND SO ENTERED."

November 25, ... Agreement to effectuate interim consent decree FILED AND ALLOWED. FREEDMAN, J.

1976

November 16, ... FREEDMAN, J. ORDER ENTERED.

1977

April 6, ... FREEDMAN. J. FURTHER AGREEMENT TO EFFECTUATE INTERIM CONSENT DECREE ENTERED.

1979

March 28, ... Stipulation and Agreement filed.

April 3, ... Stipulation and Agreement approved and entered.

1980

March 12, ... FREEDMAN, J. ORDER ENTERED.

1981

April 7, ...	Plaintiffs' Motion to Modify Remedial Orders filed.
April 7, ...	Affidavit of James S. Dittmar filed.
April 21, ...	Stipulation filed.
April 22, ...	MCNAUGHT, J. Hearing on Pltfs. and govt. intervenors motions to modify remedial orders — Motion of Fireman's Union to intervene allowed. TAKEN UNDER ADVISEMENT.
July 30, ...	CAFFREY, CH. J. Case called for status conference; Oral stipulation of facts entered into by the counsel for plaintiffs and defendants. FILED; Oral argument on motion to amend prior orders; Motion to intervene in Civil Action No. 72-3060-MC was "allowed by court."*
August 7, ...	CAFFREY J. OPINION AND ORDERED ENTERED.
August 19, ...	Stenographic transcripts of status conference held on 07/30/81, filed.
August 20, ...	Boston Firefighters' Union Notice of Appeal.
September 1, ...	MEMORANDUM AND ORDER ENTERED. PETITION FOR STAY DENIED.

*Plaintiffs and some defendants executed a stipulation filed on July 30, 1981 and reproduced at J.A. 43a-53a. This stipulation is not recorded in the docket entries; except that its terms were also recited in the oral stipulation which is recorded in the docket entry for July 30, 1981.

The Police Cases

No. 70-1220-W

1970

September 16, ...	Complaint filed.
October 5, ...	Answer of defendants Commissioners of the Massachusetts Civil Service Commission and director of Civil Service filed.
December 7, ...	Answer of defendant Edmund L. McNamara filed.
December 7, ...	Answer of defendants' Nancy Beecher, Joseph Duffy, Aaron Feinberg, Ernest LaFlamme, Helen Mitchell and Mabel Campbell filed.
November 17, ...	WYZANSKI, D.J. OPINION FILED. JUDGMENT ENTERED.
December 6, ...	WYZANSKI, D.J. ORDERED ENTERED 1. The judgment of November 17, 1971 is amended by deleting paragraph 9.
December 6, ...	WYZANSKI, D.J. JUDGMENT As amended December 6, 1971, ENTERED.
December 8, ...	Pltff's Notice of Appeal filed.
December 15, ...	Pltff's Notice of Appeal from Opinion and Judgment 11/17/71 and Order and Judgment as amended 12/6/71. . .

1972

April 31, ... Mandate received from the Court of Appeals — Judgment entered April 26, 1972. . . "Upon consideration whereof, it is now hereby ordered, adjudged and decreed as follows: The amended judgment of the District Court is affirmed in part and reversed in part and the cause is remanded for further proceedings in accordance with the opinion filed this day.

1973

March 28, ... WYZANSKI, S.D.J. MEMORANDUM FILED.

April 15, ... WYZANSKI, S.D.J. OPINION AND DECREE FILED. "Finding that the Proposed Decree is just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces, the Proposed Decree is APPROVED and Entered this day.

1975

July 2, ... TAURO, D.J. CONSENT DECREE ENTERED.

1976

July 13, ... CAFFREY, CH. J. Supplemental Consent Decree Entered . . .

1979

June 1, ... CAFFREY, CH. J. Agreement as to May, 1978 examination; filed and APPROVED.

1981

April 6, ... Affidavit of James Dittmar, FILED.

April 6, ... Pltff's motion to modify prior remedial orders filed.

April 16, ... State Deft's memorandum in opposition to pltff's motion to modify prior Court orders, filed.

April 21, ... STIPULATION FILED.

April 22, ... Motion of Boston Police Patrolmen Assoc. to intervene as party deft FILED (. . .)

April 27, ... CAFFREY, CH. J. re: motion to limit appearance, MOTION ALLOWED, and motion to intervene as party deft., MOTION ALLOWED.

July 30, ... CAFFREY, CH. J. Case called for status conference; oral stipulation of facts entered into by counsel for plaintiffs and defendants FILED; oral argument on motion to

July 30, ... amend prior orders; motion taken under advisement . . .*

August 4, ... Supplemental stipulation FILED See CA 70-1220-C

August 7, ... CAFFREY, CH. J. OPINION AND ORDER ENTERED

August 19, ... Stenographic transcripts of status conference held on 07/30/81, FILED.

August 19, ... Intervenor Boston Police Patrolmen's Assoc. Inc. Notice of Appeal filed c/s.

September 4, ... State Defts. Notice of Appeal filed.

No. 72-2982-C**
1974

July 5, ... Petition for a Writ of Injunction filed (. . .)

July 15, ... TAURO, D.J. MEMORANDUM AND ORDER ENTERED. Civil Service Respondents enjoined from appointing temporary or permanent police officers not consistent with Judge Wyzanski's Order of 4/15/73

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* Plaintiffs and some defendants executed a STIPULATION filed on July 30, 1981 and reproduced at J.A. 79a-89a. This stipulation is not recorded in the docket entries; except that its terms were also recited in the oral stipulation which is recorded in the docket entry for July 30, 1981.

** The court and the parties treated Nos. 70-1220-W and 74-2982-c as consolidated.

THE FIRE CASE

United States District Court
for the
District of Massachusetts

United States of America
Plaintiff

v.

City of Boston, et al.
Defendants

Civil Action
No. 73-269-F

Boston Chapter, NAACP, et al.
Plaintiffs

v.

Nancy B. Beecher, et al.
Defendants

Civil Action
No. 72-3060-F

INTERIM CONSENT DECREE

This case having come on for a hearing before this Court in 1973, and the Court having entered an opinion and decree on

February 8, 1974, and the Court of Appeals for the First Circuit having affirmed, and the defendants' petition for writ of certiorari to the Supreme Court of the United States having been denied, and in view of the extreme necessity that a new examination be administered, the parties consent to entry of this Interim Consent Decree to permit the administration of a new examination in accordance with the Decree of February 8, 1974. Wherefore, the parties agree that:

1. The defendant, Director of Civil Service, [hereinafter Director shall mean the Director, his successors, or after July 1, 1975, the Personnel Administrator] in implementing the February 8, 1974, Decree, shall administer a written test known as the IPMA B-1 (m) examination to all applicants for the fire service in cities and towns within the jurisdiction of Civil Service. This examination shall be administered only after defendants have satisfied the recruitment obligations imposed by paragraphs 5 and 6 of the Decree of February 8, 1974. The examination shall be given on or before July 31, 1975.

2. With regard to the validity of the IPMA B-1 (m) examination, the plaintiffs take no position as to the ultimate validity of IPMA B-1 (m) [hereinafter the "July Exam"] and agree to its use to establish an eligibility list for the certification of firefighters in Massachusetts for the sole purpose of implementing the Decree of February 8, 1974, subject to the conditions established by this Interim Consent Decree. Since the plaintiffs believe that the ranking of individuals on eligibility lists resulting from this test may have an adverse racial impact on Black and Spanish-surnamed persons the plaintiffs do not agree to the use of the results of this test for any purpose other than the implementation of the method and ratios of certification required by the February 8, 1974, Decree.

3. At least sixty (60) days prior to the Administration of the July Exam, the Director shall submit to the Parties a report

detailing the Director's proposed court ordered recruitment program. The plaintiffs shall have ten (10) days to object to the Director's program. Any dispute between the parties regarding the recruitment program, which cannot be resolved, will be resolved by this Court upon motion of any party. Any objection to the recruitment program, not made in writing within ten (10) days, shall be deemed to have been waived.

4. At least sixty (60) days prior to the administration of the July Exam, the Defendant, Boston Fire Commissioner, [hereinafter the Boston Fire Commissioner, shall mean the current Commissioner and his successors] shall submit to the parties a report detailing the City of Boston's proposed court ordered recruitment program. The plaintiffs shall have ten (10) days to object to the Boston Fire Commissioner's program. Any dispute between the parties regarding the recruitment program, which cannot be resolved, will be resolved by this Court upon motion of any party. Any objection to the recruitment program, not made in writing within ten (10) days, shall be deemed to have been waived.

5. With respect to the administration of the July Exam, the cut-off score for determining which candidates have passed the Exam will be set by agreement of the parties. Any party may submit the question of the appropriate cut-off score to this Court for resolution. In any event, the cut-off score should be set so that the method and ratios of certification described in paragraphs 8 through 12 of the February 8, 1974, Decree can be implemented.

6. If subsequent to the administration of the July Exam it appears that pools C or D are inadequate or will become depleted so as to prevent the effectuation of the method and ratios of certification described in paragraphs 8 through 12 of the February 8, 1974, Decree, the Director shall administer a second Fire Fighters Examination. It shall be left to parties,

or the Court, upon motion of any party, to determine what examination will be given, which candidates will be eligible to take the examination, and the time period within which the examination will be given.

7. The Director shall notify the plaintiffs and supply evidence to the plaintiffs whenever a particular city or town has achieved a complement of Black and Spanish-surnamed firefighters commensurate with the percentage of minorities within the community or that the fire department is serving a city or town with less than 1% Black and Spanish-surnamed population. The plaintiffs shall have thirty (30) days to object to the Director's notification. If such objection is not made within thirty (30) days, the particular city or town will no longer be subject to paragraphs 8-12 of the Decree of February 8, 1974, and certification to that city or town will be made according to existing Massachusetts law. Any disputes between the parties in this regard which cannot be resolved by the parties, will be resolved by this Court upon motion by any of the parties (Exhibit A, Fire Service under Civil Service, with racial compositions of each fire department as of Spring, 1975 has been furnished to the parties).

8. The Director shall require all candidates for fire fighter positions to provide the following information at the July Exam: Whether the candidate is (a) caucasian (white); (b) black; (c) Spanish-surnamed (i.e. the candidate was born in a Spanish-speaking country or, if the candidate was born in the United States, the candidate was raised in a home where the primary language was Spanish); (d) Other. Within sixty (60) days after the administration of the July Exam, the Director will furnish the parties with a summary of the racial composition of the candidates examined.

9. Within sixty (60) days after the July Exam has been graded, the Director will submit a report to the parties showing the results by race of all persons taking said Exam, and the name,

address and grade of each Black or Spanish-surnamed individual. Parties shall also receive an item analysis of the results of the Exam, by race.

10. Spanish-surnamed applicants for the July Exam will be given the option of taking the test in Spanish. However, the Director shall require such persons who take the Exam in Spanish to pass a literacy examination to demonstrate their ability to read and write the English language. Said literacy examination will be the Davis Reading Test.

11. Within thirty (30) days after the administration of the Davis Reading Test, the Director shall submit to the parties, a report showing the number of individuals who took the July Exam in Spanish, and the pass/fail rate of those individuals on the Davis Reading Test.

12. Following establishment of the eligibility list based on the July Exam, and every six (6) months thereafter until expiration of the eligibility list from the July Exam, counsel for all parties will be furnished with a copy of the eligibility list for each fire department subject to the jurisdiction of the Director. Further, counsel for all parties will receive from the Director the following information:

On a monthly basis:

(a) A copy of the requisition, certification, and report on certification for each requisitioning fire department.

(b) The name of each Black and Spanish-surnamed candidate from said eligibility lists whose employment is terminated.

(c) The name of each fire fighter whose transfer between fire departments have been approved by the Director subsequent to the date of this Interim Consent Decree.

Every three months:

(d) The name and address of each Black and Spanish-surnamed candidate who has passed the July Exam including the status of each such candidate's eligibility, with explanation of such status.

13. The applicants who pass the July Exam shall be required to pass a test of physical fitness. Said physical fitness test shall not include a swim component unless the appointing authority has petitioned the Director no later than the establishment of the eligibility list that in their opinion a swim component is necessary for the performance of the duties of the position. Said petition shall not be approved by the Director unless the petition includes a validation study which demonstrates the necessity for a swim component, and the reason why satisfaction of said swim component cannot be deferred until completion of the probationary period. The parties reserve their right to move this Court to resolve any dispute under this paragraph.

14. The Director shall impose upon applicants for entrance to the fire service *no educational qualification* unless the appointing authority has petitioned the Director no later than the date of establishment of the eligibility list that in their opinion an educational qualification is necessary for the performance of the duties of the position. The Director shall not approve said petition unless the petition includes a validation study which demonstrates to the Director the necessity for such educational qualification. The parties reserve their right to move this Court to resolve any dispute under this paragraph.

15. The Boston Fire Commissioner agrees that for the purpose of certifying candidates from the eligibility list from the July Exam, he will not require said candidates to pass a swim test.

16. The Boston Fire Commissioner agrees that he will not impose an educational qualification for certification of candidates from the eligibility list resulting from the July Exam.

17. The Director shall have the discretion to disqualify applicants with criminal records or on the basis of bad moral character even though such individuals do not have criminal

convictions, in accordance with guidelines established by the Director, and incorporated herein, for use of records. (See attached Exhibit B). All individuals so disqualified shall be entitled to a hearing before the Director or his designee. The procedure for administrative review shall be as set out in M.G.L. C. 31. In exercise of his discretion, the Director shall exclude applicants on the basis of bad moral character in a nondiscriminatory manner.

18. The Director, if petitioned by an appointing authority prior to certification to impose a residency preference pursuant to C. 31, § 48A, shall impose such residency preference within each of the four groups described in paragraph 7 of the February 8, 1974, Decree.

19. The Director shall disapprove any appointment unless the appointing authority has furnished said Director with a written statement of the reasons for rejecting the appointment of any candidate higher on the list. Said Director shall furnish a written statement of these reasons to the Plaintiffs' attorneys, and also to the candidate upon written request of the candidate.

20. All candidates shall be informed, individually, and in writing, prior to the time that eligibility lists are established, that they are required to meet the following criteria before they can be certified for appointment:

a. Receive a passing mark on the July Exam. Those individuals who take the July Exam in Spanish must pass the Davis Reading Test.

b. Pass a medical examination. It will be noted that said medical examination will be available for inspection at the office of the Director.

c. Pass a strength and agility test. All candidates shall receive a copy of the Strength and Agility Test for fire fighters detailing the requirements of the Strength and Agility Test.

d. Be determined by the Director to be of good moral character. It will be noted that a copy of the Standards and Procedures For The Screening Of Ex-offenders will be available for inspection at the office of the Director.

e. Provide a certificate of birth or other evidence of his date and place of birth satisfactory to the Director.

Further, each candidate shall receive, at the time provided above:

f. A list of all cities and towns which have an educational qualification for fire fighters.

g. A list of all cities and towns which require an applicant to have a driver's license.

h. A list of all cities and towns which have a minimum height requirement.

i. A list of all cities and towns which require an applicant to pass a swim test.

21. The eligibility list which resulted from the August 27, 1971, fire fighter entrance examination shall expire upon the establishment of the eligibility list from the July Exam with the exception of those persons who have been appointed provisional fire fighters from the August 27, 1971, examination eligibility list. Said provisional fire fighters shall comprise the B pool under paragraphs 7, 8, and 9 of the February 8, 1974, Decree.

22. Any applicant for fire fighter in any city or town whose application was filed in the Division of Civil Service on or after August 27, 1971, and who had not reached his 35th birthday on August 27, 1971, as required by C. 194 of the Acts of 1974 shall be eligible to take the July Exam, and shall be eligible for appointment, provided he has reached his nineteenth birthday on the date of application and that he meets all other requirements of law.

23. The Boston Fire Commissioner fully anticipates that at the time that a new eligibility list is posted as a result of the

July Exam, there will be sufficient vacancies so that the number of Black and Spanish-surnamed persons hired will approximate the number of provisional appointments made since the entry of the February 8, 1974 Decree. The Boston Fire Commissioner agrees that prior to the appointment of persons from Group D, the said Commissioner will appoint, if available, a number of persons from Groups A and C to equal the number of persons appointed from Group B.

The timetable for appointing Black and Spanish-surnamed applicants will be governed by the ability of the Department to adequately train incoming applicants in accordance with past practices and will be governed by the method and ratios of certification as described by paragraphs 8 through 12 of the February 8, 1974 Decree.

24. The parties agree that Black and Spanish-surnamed persons who passed a prior fire fighter entrance examination, if otherwise qualified for placement on the current eligibility list in accordance with the entrance requirements set forth in this Interim Consent Decree, shall immediately be placed at the head of the current eligibility list. Said persons also shall be certified for permanent appointment ahead of eligible persons who comprise Group A, in accordance with the method and ratios of certification described in paragraphs 8 through 12 of the February 8, 1974 Decree. Plaintiffs shall furnish the Director the names of Black and Spanish-surnamed persons who passed a prior fire fighter entrance examination.

25. The parties agree that no individual shall be certified for permanent appointment unless said individual has passed a fire fighter entrance examination.

26. The eligibility list established as a result of the July Exam including Group B as described by Paragraph 21 above, shall be established within six (6) months of said Exam and shall expire two years from the date said list is first established.

27. This Interim Consent Decree is in no way designed to lower the standard for certification of fire fighters.

Consented to this 17th day of April, 1975.

4-17-75
Approved and so entered.

/s/_____
Frank H. Freedman
United States District Judge

AGREEMENT TO EFFECTUATE INTERIM CONSENT DECREE

This Court having approved and entered entered an Interim Consent Decree in this action on April 17, 1975, to *allow a new firefighter entrance examination* to be given, and said examination having been given, the parties consent to entry of this Agreement to permit the marking of said examination and the establishment of an eligibility list for the position of firefighter in the Commonwealth of Massachusetts.

WHEREFORE, the parties agree that:

1. The Division of Personnel Administration (formerly known as the Division of Civil Service, and hereinafter, the "Division") shall provide individual applicants with their score on the IPMA examination administered July 10, 11, 12, 1975, but shall not give the scores of any individual, or group of individuals, to an appointing authority.

2. The 26 (twenty-six) Spanish-surnamed applicants who took the IPMA in Spanish and received a passing score but who did not successfully complete the Davis Reading Test, promptly will be allowed to re-take the Davis Reading Test. The reason for this re-test is that there was a misunderstanding among the parties as to its administration. Said applicants who successfully complete the Davis Reading Test shall be considered for certification in the same manner as other applicants.

3. The Division shall administer a medical examination to each applicant being considered for certification. An applicant who fails said examination shall have the right to be retested by a medical review board. At the time of his failure of his first examination, said applicant shall be informed, in writing, of the right to be re-tested by a medical review board, as well as the rights set forth in Paragraph 4 of this Agreement.

4. An applicant who, after failing his first medical examination, appeals to the medical review board and is found medically unfit by the medical review board, shall be removed from the list of those applicants being considered for certification, provided that an applicant may file his one appeal to the medical review board within one year of his failure of the first exam, and further provided that appeals will be processed and completed within 30 (thirty) days of the time an appeal is filed. Nothing in this paragraph shall be deemed to extend the life of the eligibility list.

5. An applicant who fails his initial medical examination shall not be disqualified from taking the physical fitness test if (a) the examining physician certifies that the reason for his failure of said examination would not pose a threat to his health and safety if he were to take the physical fitness test and (b) the applicant signs a waiver holding the Division and physician harmless from liability for injury and for death, as a result of the applicant's condition becoming aggravated by the physical fitness test.

6. The Division or, on its behalf, the Massachusetts Firefighting Academy, shall administer a physical fitness test, to each applicant being considered for certification. The test will consist of 6 (six) different events and given on a pass/fail basis. A copy of the physical fitness test, which is attached hereto, will be mailed, together with IPMA results, to each applicant who has passed the IPMA. Each applicant shall be allowed to attempt each event twice on the same day. The plaintiffs take no position as to the validity of the physical fitness test. The parties reserve their right to petition the Court for resolution of any disputes resulting from the physical fitness test having a significant impact on any group, in accordance with Paragraph 13 of the Interim Consent Decree.

7. If an applicant fails the physical fitness test, his name will not be placed on the certification list for which he was

being considered. Said applicant shall have the right to retake the entire physical fitness test, when he is again being considered for certification, provided that he may choose the certification at which to re-take said test. At the time of his failure of his first test, said applicant shall be informed, in writing, of the right to re-take said test, including the right to choose the certification at which to re-take said test. If an applicant, after failing at his first test, fails this second test, he shall be removed from the list of those applicants being considered for certification.

8. The Division shall certify applicants who have satisfied the IPMA, the medical examination, the physical fitness test, and the moral character test, prior to certification. In the cities of Boston, Bockton, Cambridge, Chelsea, Holyoke, Lawrence, Lynn, New Bedford, Springfield and Worcester, the Division shall give additional firefighter examinations, during the life of the list from the July, 1975, exam, if it appears, or in fact becomes, impossible to certify applicants to the above-named cities in accordance with the Decree of this Court, dated February 8, 1974, and the Interim Consent Decree, dated April 17, 1975, in a manner which will effectuate said Decrees. In cities and towns, other than the above-named, the Division shall not be required to give additional examinations during the life of the list from the July, 1975, exam even if the A and C pools become depleted. For each of the above-named cities, plaintiffs promptly will be provided a list of eligibles, and at the times, each is sent a certified list of eligibles, a copy of said certification.

9. Plaintiffs, at the time when applicants are sent their results on the IPMA, will be furnished with the name, address (including, if possible, address labels) and score of each minority applicant. Plaintiffs, promptly, will be furnished with the name and address of each of the 26 (twenty-six) Spanish-surnamed applicants who has the right to re-take the

Davis Reading Test, and will be furnished with the score for each such applicant who re-takes the Davis Reading Test. Plaintiffs, on a monthly basis, will be furnished with the name and address of each candidate who fails the physical fitness test, and the reasons therefor. In accordance with Paragraph 20 of the Interim Consent Decree, applicants who pass the IPMA will be mailed, together with IPMA results, the information about certification and hiring criteria set forth in said Paragraph 20, and applicants will be informed of the obligation to notify the Division of any change of mailing address.

10. The Fire Commissioner of the City of Boston agrees that minority applicants will be appointed 40 (forty) at a time, and candidates from Group B will be appointed 40 (forty) at a time, until the number of minority appointments equals the number of white appointments made since February 8, 1974, in conformity with Paragraph 23 of the Interim Consent Decree and the letter from the Fire Commissioner to Judge Freedman, dated April 16, 1975.

11. No fire department which is currently subject to the minority preference required by Paragraphs 8-12 of the Decree of February 8, 1974, may be exempted from said Paragraphs unless the appointing authority has first petitioned the Division that the percentage of post-probationary minority uniformed personnel equals the percentage of minorities in the city or town served by said department, and the parties have otherwise satisfied Paragraph 7 of the Interim Consent Decree.

12. The parties reserve all rights to move this Court to resolve any dispute under this Agreement or the Interim Consent Decree.

Agreed to this 25th day of November, 1975.

Approved and entered by:

/s/_____

Frank H. Freedman
U.S. District Judge

DATED: November 25, 1975

ORDER

November 16, 1976

FREEDMAN, D.J.

The Court has been asked to rule on two motions, both of which, if granted, would modify the decree issued as part of the opinion in *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). While it would be unproductive at this time to review that case in detail, I would state generally that in the decree (hereinafter the 1974 decree) this Court enjoined the use of the then current written examination employed in selection of persons for the position of firefighter in the cities and towns of Massachusetts, ordered the City of Boston and its Fire Commissioner to begin additional recruiting of minorities, and established for Blacks and Spanish-surnamed persons a preference in hiring to compensate for the effects of past discrimination. Subsequently, on April 17, 1975, the parties entered into an interim consent decree which permitted the administration of a new examination in accordance with the 1974 decree. Such an examination was given in July, 1975, and a certified list of candidates for firefighter was issued by the Personnel Administrator on August 18, 1976.[1]

At the time the 1974 decree was issued, the Court was aware of the possibility that a city subject to the ruling might in the near future be in immediate need of firefighters prior to the administering of a new examination and the issuance of a new Civil Service eligibility list. Paragraph 3 of the decree dealt with this possibility by stating:

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[1] The position of Personnel Administrator was formerly known as the Director of the Division of Civil Service. What is now entitled the Division of Personnel Administration was formerly known as the Division of Civil Service. To avoid confusion, the Division of Personnel Administration will be referred to herein as Civil Service.

> The City of Boston and any other city or town subject to Civil Service law may request Civil Service for immediate certification of candidates who are currently on the existing Civil Service eligibility list to fill, on a provisional basis, existing vacancies or vacancies which may arise prior to full compliance with this decree. The Court further orders that the life of said list shall, if necessary, be extended beyond the time of its expiration under Massachusetts law and until a new eligibility list is established in accordance with this decree. Should the existing list prove insufficient to fill the number of vacancies existing, the cities or towns subject to Civil Service law may hire firefighters on a provisional basis. The method of selection shall be left to defendants' discretion.

371 F. Supp. at 521. The subject of provisionals was also dealt with in paragraph 21 of the April 17, 1975 Interim Consent Decree:

> The eligibility list which resulted from the August 27, 1971, firefighter entrance examination shall expire upon the establishment of the eligibility list from the July Exam with the exception of those persons who have been appointed provisional firefighters from the August 27, 1971, examination eligibility list. Said provisional firefighters shall comprise the B pool under paragraphs 7, 8, and 9 of the February 8, 1974, Decree.

The current court action began in September, 1976, when the Fire Commission of the City of Springfield (hereinafter the Commission) filed a Motion to Intervene and a Motion for Relief From Judgment. The Commission's motions were

prompted by its desire to determine the status of certain provisional firefighters hired after the issuance of the 1974 decree. Unable to fulfill its need for provisional firefighters by selection of individuals from within Group B, the Commission had taken on other provisionals, some prior to the administering of the new exam in July, 1975, some after. Those in question at this time, however, took the July, 1975 exam and are now certified as members of Group D. What the Commission is now asking in its Motion for Relief From Judgment is that those provisionals be listed first in Group D.[2] In support of that request the Commission points out the time and money invested in the training of the provisionals, as well as the argument that fairness requires that these provisionals be given preference over others in Group D by virtue of the time they have served as firefighters. It further argues that while the provisionals in question took the same on-the-job risks as those hired from Group B, they are not being treated the same, since the B provisionals were listed first in Group B by virtue of the 1974 Decree and the April 17, 1975 Interim Consent Decree. Finally, it asserts that after the hiring of the provisionals, the absolute preference given to veterans within Civil Service in Massachusetts was ruled unconstitutional by a three-judge District Court in *Anthony* v. *Commonwealth of Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976), and that this change in the law has significantly altered the ranking of the provisionals on the Civil Service list.

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[2]The motion seeks modification of paragraph 7(d) of the 1974 decree so that it would read as follows (emphasis has been given to the Commission's suggested addition).

> Group D shall consist of all other persons, excluding those in Groups A, B and C, who pass the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said persons shall be ranked in accordance with existing Massachusetts law, *except that any persons who have been appointed to the City of Springfield Fire Department from said list on a provisional basis shall be listed first.*

A hearing on this matter was held on October 28, 1976, at which time this Court allowed the Commission's Motion to Intervene, but only for the limited purpose of determining the status of the provisionals in question. At that time the Court also allowed another motion to intervene filed by four candidates for permanent appointment as firefighters in Springfield who are named in the D Group of the current certification list.[3] That motion was allowed for the same limited purpose as in the case of the Commission.

At the October 28, 1976 hearing, following oral arguments, the Court requested that within one week plaintiff and the Commission attempt to draft and submit a written agreement regarding the status of the provisionals in question, and that all parties wishing to submit arguments on the issue at hand do so by November 9, 1976. It is now apparent that such an agreement was not reached. However, besides memoranda filed by the various parties, what was eventually submitted was an additional motion by plaintiff NAACP to amend the 1974 decree by adding a sixteenth paragraph that would read as follows:

> Notwithstanding Paragraph 9 (a) and (c) of this Order, upon the exhaustion of Groups A and B, candidates shall be certified to the Springfield Fire Department on the following basis:
>
> (a) on the certified list, dated August 18, 1976, one candidate from Group C for each candidate from Group D

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[3] These four intervenors are Robert Gallant, James Martin, Gary Dunkin, and James Fahey. They state they are now eligible for, and willing to accept, permanent appointment as a firefighter in the Fire Department of The City of Springfield. None of them is a provisional appointee, but each claims an interest in this case in that, if granted, the Commission's Motion for Relief From Judgment would impair and impede his ability to protect his interest in obtaining permanent appointment.

provided that the Director of Personnel Administration shall approve not more than sixty appointments from said certified list.

(b) On subsequent certified lists, prepared after the Director of Personnel Administration administers a firefighter entrance examination to applicants for appointment to the Springfield Fire Department, until such time as the number of persons appointed from Groups A and C equals the number of persons appointed from Groups B and D, four candidates from Group C for each candidate from Group D.

At the outset, I wish to make it clear that paragraph 15 of the 1974 decree, which states that "[t]he Court shall retain jurisdiction for such further action as may be necessary or appropriate," was not intended as an indication that the case of *Boston Chapter, NAACP, Inc.* v. *Beecher* would remain open *ad infinitum* or that the Court would entertain as part of that case any and all dissatisfactions that various cities, towns, or individuals might have with the decree. It was merely incorporated to facilitate the resolution of problems between the original parties in their efforts to implement the decree. I do not consider the motions which are now before the Court to be of the nature contemplated when paragraph 15 was conceived. Nevertheless, I hereinafter enter my determinations and reasoning regarding them.

While I can appreciate the arguments made by the Fire Commission of the City of Springfield, after careful consideration, I feel that I have no choice but to deny its Motion for Relief From Judgment. Beyond my thinking that such an amendment to the 1974 decree would be ill-advised at this late date, I am of the opinion that giving the provisionals in question the requested preference would be contrary to the law of

the Commonwealth, as well as unfair to those non-provisionals who are on the eligible list and hoping to obtain appointment as firefighters. Chapter 31 of the Massachusetts General Laws, which sets forth the rights and duties of those within the Commonwealth's Civil Service System, gives no rights to a provisional appointee. The authorization of provisional appointments is within the discretion of the personnel administrator, and he may terminate them at any time. Mass. Gen. Laws c. 31 § 15.[4] Even if the personnel administrator is not inclined to terminate the appointments, they are at certain points in time terminated by operation of law. Provisional appointments must terminate within six months and fourteen days from the date of a written examination, Mass. Gen. Laws c. 31, § 12, or within thirty days after the establishment of an eligibility list for the position to be filled, *id.* § 15, whichever occurs first.

The amendment to the 1974 decree requested by the Commission, if made, would provide the provisionals with a priority not contemplated by the laws of Massachusetts. While this Court may in appropriate circumstances interpret those laws,

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[4]The status to be given a provisional employee was apparently made clear to those in Springfield at the time they made application for the position by means of a sheet which began: "INSTRUCTIONS AND EXPLANATION FOR PROVISIONAL APPOINTEES — READ CAREFULLY." That sheet read in part:

> EXPLANATION OF PROVISIONAL APPOINTMENT.
>
> When appointed provisionally, you do not have tenure. (Guaranteed perminent [*sic*] employment) You will still be required to take the next civil service Exam. for firefighter. You must pass this examination plus a strength test and your standing on the certified list will have to be high enough so that your name comes in to the appointing authority for consideration on a certification for perminent [*sic*] appointment. . . . If you do not pass the Exam. or strength test, you cannot be appointed permanently. Remember, being provisionally appointed does not guarantee permanent employment.

it may not restructure them or give them an interpretation that cannot fairly be drawn.

Although there is an initial similarity between what the Commission is requesting regarding a preference in Group D for the provisionals involved herein and the apparent preference given to Group B provisionals whose names had been on the eligibility lists established in April, 1972, there is in fact a distinction. The latter group of appointees had taken and passed a firefighter examination given in 1972. These Group B provisionals were high on the 1972 eligibility list and, but for this Court's 1974 decision, would have eventually obtained permanent appointment. Having already passed the examination and been placed on the eligibility list, it can be said that they had a vested interest in such permanent appointments, and that, as argued by Civil Service, by giving them a preference on future lists, this Court did not accord them any status that they would not have otherwise had. The provisionals now in question, on the other hand, had not passed an examination prior to this Court's 1974 ruling. There is nothing that entitles them to any type of preferred status.

It is understandable that the Commission is concerned over the time and money expended in the training of its provisionals. But, rather than lost, its investment is only postponed. The provisionals, according to what is in the record, have taken and passed the new examination. Those who under Massachusetts law are placed on the eligibility list and are chosen for permanent positions in the future will not have to be retrained.

I do not feel that the effect of the *Anthony* case on veterans preference in Massachusetts is germane to a decision of the issues now before the Court. That the ruling works a hardship on the Springfield Fire Commission because the provisionals it hired are now farther down on the eligibility list is regrettable, but certainly no reason for placing a provisional ahead of

another applicant for permanent appointment. To do so simply because he is a veteran would be circumventing the reasoning and desired result of *Anthony*, which affects many persons, not only firefighters.

I must also deny plaintiff's motion to amend the 1974 decree. I realize that it has been prompted by what plaintiff considers to be serious underrepresentation of Black and Spanish-surnamed firefighters in the Springfield Fire Department. Nevertheless, the Court is not of the opinion that an amendment to the 1974 decree, which was issued well over two and one-half years ago, is the proper way to remedy any underrepresentations of those two minority groups. Prior to the issuance of the 1974 decree, this Court gave careful consideration to past minority discrimination in the selection of firefighters in Massachusetts and possible ways to compensate for it which would at the same time avoid the creation of a procedure that might lead to reverse discrimination. I feel that the preference established in the decree is sufficient to remedy that problem. What is essential to the successful effectuation of that decree, however, is a recruiting program that makes minorities aware of the position of firefighter and the manner in which to properly qualify for it.

The Court is sympathetic to the interests of all parties concerned with the permanent appointment of firefighters in the cities and towns of the Commonwealth. I fully realize that the provisional appointments in question at this time will terminate within a matter of days. However, I feel that the Massachusetts laws regarding such appointments are clear and must be adhered to. In its February 8, 1974 decree, after serious consideration of the issues involved and all persons who would be affected by its ruling, the Court set forth what it believed was the fairest method to compensate for past discriminatory appointment practices. I feel that plaintiff NAACP, defendant Civil Service, and cities such as Spring-

field can work within the decree's framework in a manner that, consistent with the laws of Massachusetts, will assure all those interested a fair and equal opportunity for permanent appointment as a firefighter. Whether that will involve such actions as increased recruitment programs for minorities or additional examinations are questions that such parties should resolve amongst themselves. In the meantime, unless it can be shown that the 1974 decree is inadequate to achieve its desired ends, or that fair appointment procedures are being hindered by applicable state laws or by the malevolent actions of some individual, the United States District Court can not properly be asked to intervene further.

The motion by the Fire Commission of The City of Springfield for relief from judgment is denied. Plaintiff's motion to amend the February 8, 1974 decree is also denied.

/s/_____
Frank H. Freedman
United States District Judge

FURTHER AGREEMENT TO EFFECTUATE INTERIM CONSENT DECREE

This Court having approved and entered an Agreement to Effectuate Interim Consent Decree on November 25, 1975, pursuant to Paragraph 8 of said Agreement, the parties consent to entry of this Further Agreement since it is apparent that the "C" pools for the cities of Boston, Cambridge, Holyoke, Lawrence, Lynn, New Bedford, Worcester, and Springfield have become depleted.

1. The Division of Personnel Administration shall give another firefighter entrance examination in the cities of Boston, Cambridge, Holyoke, Lawrence, Lynn, New Bedford, Worcester and Springfield pursuant to Paragraph 8 of the Agreement to Effectuate Interim Consent Decree, entered by the Court on November 25, 1975.

2. Only those who are residents in the city in which the examination is given, at the time of application, shall be eligible to take the examination, provided that person is otherwise qualified under Massachusetts Law. Applicants who pass the examination and physical fitness test, and are otherwise qualified for certification, shall be eligible for certification to the city in which they reside at the time of application.

3. A firefighter examination will be held in the cities of Holyoke, Lawrence, Springfield and Worcester on June 11, 1977.

4. A firefighter examination will be held in the cities of Boston, Cambridge, Lynn and New Bedford on July 23, 1977.

5. Applications for the June 11, 1977 and July 23, 1977 examinations will be received on an open, competitive basis. The Personnel Administrator reserves the right to set a cut-off date for receipt of applications and to limit the number of applicants for each examination, provided that this is done in a manner which will insure that the method and ratios of the Court's February 8, 1974 decree are effectuated.

6. The eligible lists resulting from the June 11, 1977 and July 23, 1977 examinations shall be established by October 15, 1977 and November 30, 1977, respectively. The eligibility lists based on the June 11, 1977 and July 23, 1977 examinations shall merge with the eligibility lists based on the July, 1975 examination, in accordance with Massachusetts Law (M.G.L. c. 31, § 12). However, nothing in this Further Agreement is designed or intended to extend the life of the eligibility list based on the July, 1975 examination beyond its expiration date (i.e., May 28, 1978).

7. The Division of Personnel Administration shall undertake an affirmative recruitment campaign to attract Black and Spanish-surnamed applicants to take the June 11, 1977 and July 23, 1977 examinations.

8. The examinations will be the IPMA, as modified.

9. Paragraphs 2, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, and 27 of the Interim Consent Decree entered in this matter on April 17, 1975 and paragraphs 1, 3, 4, 5, 6, 7, and 11 of the Agreement to Effectuate the Interim Consent Decree, entered November 25, 1975, are incorporated by reference in so far as their provisions are consistent with this Order.

10. When a Black or Spanish surnamed candidate's name has appeared on three certification lists, and the candidate has failed to respond for interviews to all of the cities and towns to which he is certified, the Personnel Administrator may remove his name from the list of eligibles. The Personnel Administrator must inform the candidate by certified mail that his name will be removed unless the candidate informs the Personnel Administrator of his continued interest, provided that said candidate is also informed of his right to restore his name to the list of eligibles during the life of the list. Removal shall be affected ten days after receipt of the certified letter, except where the candidate requests his name remain on the eligible list.

11. The eligibility lists based on the June 11, 1977 and July 23, 1977 examination will expire two years from the dates of establishment of said lists, in accordance with Massachusetts law. No provision contained herein shall be construed to prevent additional firefighter examinations, in accordance with Paragraph 8 of the Agreement to Effectuate Interim Consent Decree.

12. The Personnel Administrator shall notify all Black and Spanish-surnamed persons who failed the July, 1975 exam or who passed the exam but have not secured appointment, of their right to take the June 11, 1977 and July 23, 1977 examinations.

13. The Personnel Administrator shall notify the plaintiffs of the names of all candidates removed from the eligibility list, pursuant to the procedure set forth in paragraph 10, above; and shall furnish the plaintiffs with a copy of any requisition filed by any of the eight named cities, between the date of this Further Agreement and the date of establishment of the eligibility list, and, in advance of mailing to any such city, a copy of the certified list to be sent in response to said requisition.

14. The Personnel Administrator shall require that each of the eight named cities, at the time such city files its report of the names of candidates to be appointed, informs by mail, each candidate who appeared for possible appointment, of the status of his candidacy (i.e., "appointed", "rejected", or "not reached").

15. The Fire Commissioner of the City of Boston shall recruit Black and Spanish surnamed candidates for the July 23, 1977 examination, in accordance with this Court's February 8, 1974 decree.

Agreed to this 1st day of April, 1977.

Approved and entered by:

/s/_____

Frank H. Freedman
U.S. District Judge

DATED: April 6, 1977

STIPULATION AND AGREEMENT

In June 1978 the Division of Personnel Administration administered an examination for the position of firefighter. The parties have been unable to agree upon the validity of that examination or upon an appropriate passing score.

The eligible list from the 1975 statewide examination expired in October 1978 and most cities and towns in the Commonwealth have no lists from which to make firefighter appointments. To insure that the various cities and towns of the Commonwealth will be able to make firefighter appointments pending further order of this Court, the parties STIPULATE AND AGREE that:

1. The Division of Personnel Administration may use the results of the June 1978 Firefighter Entrance Exam to establish eligible lists and to certify applicants for the position of firefighter to the cities and towns.

2. Any individuals who are appointed from eligible lists resulting from the June 1978 exam, and who meet all the requirements of law and regulations at the time of their appointment, shall not have their appointment invalidated or their permanent status affected, by subsequent findings of this Court regarding the validity or appropriate passing score of the June 1978 exam.

3. The plaintiffs reserve the right to move this Court to enjoin the use of a certified list to be sent to any city or town when the plaintiffs believe that use of such list would violate orders of this Court.

Agreed to this 26th day of March 1979.

Approved and entered by:

/s/_____
Frank H. Freedman
U.S. District Court Judge

DATED: April 3, 1979

ORDER

On August 7, 1979, plaintiff NAACP brought a Motion for Further Relief against defendant Massachusetts Division of Personnel Administration (hereinafter "DPA"), alleging that DPA had failed to engage in adequate minority recruitment for the June, 1978 statewide firefighter examination in violation of Paragraph Six of the Court's decree of February 8, 1974.

On October 17, 1979, plaintiff United States filed a motion to enforce Paragraph Six of the Court's February 8, 1974 decree, alleging that Defendant DPA and defendant City of Boston had failed to engage in such recruitment efforts as were necessary to achieve the goals set forth in Paragraphs Eight through Twelve of that decree.

On November 28, 1979, plaintiff NAACP filed a Further Motion for Relief, alleging that the City of Boston had failed to comply with Paragraph Six and that approximately 150 firefighter vacancies in 1980 in the Boston Fire Department and 150 during 1981 would be filled exclusively by non-minority candidates because of the City of Boston's inadequate recruitment efforts prior to the June, 1978 examination.

In separate answers, defendants DPA and the City of Boston denied all plaintiffs' allegations and contended that they had complied at all times with the Court's decree of February, 1974.

The parties appeared before this Court on December 6, 1979 for a hearing on these motions, and at the urging of and with the guidance of the Court engaged in substantive discussions which result in entry of the following order:

1. Plaintiff NAACP motion for further relief against DPA is dismissed with prejudice. Plaintiff United States motion to enforce Paragraph Six of the Court's decree, in regard to DPA is dismissed with prejudice.

2. DPA will administer an examination for the entry level position of firefighter for the cities of Boston and Springfield no later than June 28, 1980. Each of these examinations will be open only to residents of each respective city at the time of application.

3. DPA will establish firefighter eligibility lists for the cities of Boston and Springfield not later than 120 days from the date of the examination in each city.

4. DPA will canvas the fire departments in the following cities to determine the projected number of firefighter appointments in each department for 1980 and for 1981:

Boston	Lawrence
Springfield	Cambridge
Holyoke	Lynn
Worcester	New Bedford
Brockton	Lowell

5. For those cities listed in paragraph four (4), *supra*, excluding Boston and Springfield, to which DPA is, or will be, unable to certify one (1) black or Spanish-surnamed (hereinafter "minority") firefighter candidate for every three (3) non-minority candidates to make the anticipated appointments, DPA will administer a new firefighter examination not later than October 30, 1980.

6. DPA will establish eligibility lists not later than six months after each examination administered pursuant to paragraph five (5), *supra*.

7. For the purposes of paragraphs five (5) and eight (8) herein, in determining whether DPA is able to certify minority firefighter candidates from the current eligibility lists in the ratios as set forth in the Court's decree of February, 1974, minorities who have been certified previously will not be

counted as certifiable candidates unless they were certified before and, although willing to accept, were not reached for processing by the appointing fire department or unless they were certified before and, thereafter, have successfully appealed a prior medical, physical or other disqualification.

8. When DPA receives a requisition for firefighter certifications from any of the cities listed in paragraph four (4), *supra*, and is unable to certify minority candidates in the ratios as set forth in the Court's decree of February, 1974, the following procedure will be undertaken:

a) A certified list will be sent for as many positions as there are sufficient minority candidates as defined in paragraph seven (7), *supra*;

b) With the certified list referred to in subparagraph eight (8) a, *supra*, DPA will send a letter to the city making the requisition, explaining that there are insufficient numbers of minorities on the current eligibility list to meet the certification goals of the Court's decree and that a new firefighter examination is scheduled, and the date of that examination. DPA will urge the city to make no additional appointments until such time as a new eligibility list is established. If the city insists upon making the additional appointments, DPA will require the city to specify the minimum number of additional appointments necessary to prevent a public safety emergency and to state reasons for its position that such a public safety emergency exists;

c) If DPA approves the request for additional appointments, it shall notify plaintiffs of its intention to make additional certifications;

d) Plaintiff will have two (2) weeks from the date of notification of DPA'S decision, to present the matter to the Court for resolution;

e) This procedure will be followed until a new eligibility list is established for each of the cities listed in paragraph four (4), *supra*.

9. DPA will prepare a written minority recruitment plan for the examinations to be given in Boston and Springfield. A detailed outline of the plan will be submitted to plaintiffs by February 15, 1980, and will contain a draft of the posters, announcements and other recruitment literature. The final plan will be submitted to plaintiffs by March 1, 1980, and the implementation of the plan shall begin no later than March 15, 1980.

10. DPA will contact Roscoe J. Hamby, Jr., Director of the Labor Recruitment Program, International Association of Firefighters, for the purpose of retaining his participation in the recruitment drives for the 1980 examinations. DPA will promptly notify plaintiffs of the results of all contacts made with IAFF.

11. For the examinations to be given in cities other than Boston and Springfield, DPA will prepare a written recruitment plan and provide plaintiffs a detailed outline at least 120 days prior to the scheduled date and the final plan no later than 90 days prior to the last date for acceptance of applications. Implementation of the plan will begin no later than 90 days prior to the last date for acceptance of applications.

12. DPA will prepare written recruitment plans for at least the next three (3) administrations of statewide firefighter examinations or examinations in each city listed in paragraph (4) *supra*, or until the minority representation in that city's fire department reaches parity with the minority population of

that city. Such future recruitment plans will be submitted to plaintiffs at least four (4) months prior to the examination date, and implementation of the plan shall begin no later than three (3) months prior to the last date for acceptance of applications.

13. In firefighter examinations to be administered during 1980 the deadline for applications will be no greater than fifteen (15) days prior to the examination date.

14. When a new firefighter eligibility list is established for the City of Boston, DPA will certify three (3) minority candidates for every one (1) non-minority candidate for such time as is necessary for the City of Boston to achieve any appointment goals as may be set forth in a separate stipulated agreement between plaintiffs and the City of Boston, which is incorporated herein by reference. The obligation of DPA to certify minority candidates at a three-to-one (3:1) ratio is not limited to the eligibility list established as a result of the June, 1980 examination but applies to all future eligibility lists in the City of Boston until the City has fulfilled its appointment goals as set forth in the separate stipulated agreement.

15. If the number of minority persons appearing on eligible lists to the Cities of Boston and Springfield resulting from the June 28, 1980 firefighter examination are going to be depleted prior to the expiration of said list so as to make certification in accordance with the ratios set out in paragraphs 8-12 of the Court's February 8, 1974 decree, and paragraph 14, *supra*, impossible, DPA shall give another firefighter exam, forthwith.

In determining the number of minority persons on an eligible list, such persons who have been certified previously will not be counted as certifiable candidates unless they were certified before and, although willing to accept, were not reached for processing by the appointing fire department or, were previously certified and have successfully appealed a prior medical, physical or other disqualification.

16. The plaintiffs shall furnish DPA, in a separate letter, a list of elements which they believe should be included in DPA's recruitment plan for the examination to be administered on June 28, 1980.

17. The State Defendants will pay to the Massachusetts Advocacy Center the sum of $2,131.90 and to Western Massachusetts Legal Services, Inc. the sum of $2,131.90 as attorney's fees in full settlement of all attorneys fees entitlement from the issues addressed in plaintiffs' motion for further relief. The State Defendants' payment of these fees shall not be construed to constitute a waiver of defendants' objection and opposition to plaintiffs' motion for attorneys fees now pending before this Court. The State Defendants' objection and opposition to plaintiffs' entitlement to attorneys fees and to the amount of those fees is specifically reserved and further the State Defendants have not altered or waived their position that this action was not a pending case for the purpose of an award of attorneys fees under the Civil Rights Attorneys Fees Act. Any portion of said fees not paid by January 1, 1981 shall bear interest at the rate of 8% from August 1, 1980.

Agreed to as to form this 1st day of February 1980.

Approved, Entered and so Ordered by:

/s/_____
Frank H. Freedman
United States District Judge

Dated: March 12, 1980

PLAINTIFFS' MOTION TO MODIFY PRIOR REMEDIAL ORDERS

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, plaintiffs move for an order, in the form attached hereto, of modification of prior remedial orders entered by this Court. Pursuant to local rule 12(c), plaintiffs hereby request oral argument on this motion. Plaintiffs believe that two hours will be sufficient for all parties to be heard.

STIPULATION

Plaintiffs and defendants herein hereby stipulate to the following facts relating to this Court's determination of the pending Motion to Modify Prior Remedial Orders. The parties reserve the right to present to the Court additional facts by affidavit or other means.

1. Since 1974, the Boston Fire Department has hired a total of 553 sworn personnel.

2. Of these, 248 are black and Hispanic, representing forty-five (45) percent of the sworn personnel hired since 1974.

3. The following chart shows annual hiring by the Boston Fire Department since 1974:

	Total Hired	Blacks and Hispanics Hired	Percent Blacks and Hispanics Hired
1976	79	34	43 percent
1977	198	90	45 percent
1978	179	87	49 percent
1979	52	27	52 percent
1980	45	10	22 percent

4. On July 7, 1981, the Boston Fire Department employed a total of 1690 sworn personnel, of whom 248 (14.7 percent) are black or Hispanic.

5. According to the *Advance Reports 1980 Census of Population and Housing: Final Population and Housing Unit Counts* issued by the Bureau of the Census and the United States Department of Commerce, minorities constitute 30 percent of the population of the City of Boston.

6. On July 8, 1981, the Boston Fire Department commenced a systematic program of reductions in force of sworn

personnel in order to meet what the City of Boston asserts to be a fiscal crisis. This program has proceeded and is intended by City and Fire Department officials to proceed as set forth in this stipulation.

7. On July 8, 1981, 27 sworn personnel in the Boston Fire Department, of whom 7 (26 percent) are black or Hispanic, were removed from the payroll. (Exhibit A). As a result of this reduction in force, the total number of sworn personnel in the Boston Fire Department was 1663, of whom 241 (14.5 percent) are black or Hispanic.

8. On July 15, 1981, 49 sworn personnel in the Boston Fire Department, of whom 25 (51 percent) are black or Hispanic, were removed from the payroll. (Exhibit B). As a result of this reduction in force, the total number of sworn personnel in the Boston Fire Department was 1614, of whom 216 (13.4 percent) are black or Hispanic.

9. On July 22, 1981, 41 sworn personnel in the Boston Fire Department, of whom 13 (31.7 percent) are black or Hispanic, were removed from the payroll. (Exhibit C). As a result of this reduction in force, the total number of sworn personnel in the Boston Fire Department was 1573, of whom 203 (12.9 percent) are black or Hispanic.

10. On July 29, 1981, 38 sworn personnel in the Boston Fire Department, of whom 23 (60.5 percent) are black or Hispanic, were removed from the payroll. (Exhibit D). As a result of this reduction in force, the total number of sworn personnel in the Boston Fire Department is 1535, of whom 180 (11.7 percent) are black or Hispanic.

11. The City of Boston has prepared a schedule for additional lay-offs of sworn personnel in the Fire Department to occur in groups by class, on a weekly basis. This plan for additional reductions in force will be implemented as follows:

(a) On or by August 5, 1981, 18 additional sworn personnel, of whom 13 (72.2 percent) are black or Hispanic, will be re-

moved from the payroll leaving 1517 sworn personnel in the Department, of whom 167 (11 percent) are black or Hispanic.

(b) On or by August 12, 1981, 34 additional sworn personnel, of whom 32 (94.1 percent) are black or Hispanic, will be removed from the payroll, leaving 1483 sworn personnel in the Department, of whom 135 (9.1 percent) are black or Hispanic.

12. The collective bargaining agreement between the City of Boston and Local 718 of the International Association of Firefighters contains no express provisions as to the manner in which layoffs are to be accomplished.

13. The Boston Fire Department intends the reduction in force referenced above to comply with the provisions of Mass. Gen. Laws ch. 31, §§ 39 and 41.

Dated: July 29, 1981

General Orders
No. 53

Headquarters, Fire Department
July 6, 1981

TERMINATION NOTICES

Due to Proposition 2½ which must be absorbed by all City departments and the lack of any definite State Aid to the City of Boston, I regretfully announce the following:

As of 0800 hours, Wednesday, July 8, 1981, the following named members will be terminated from their position of Fire Fighter:

Richard B. Gordon	Engine Company 29
Michael P. Finn	Engine Company 8
Stephen P. Creamer	Engine Company 56
Patrick J. Brady, Jr.	Engine Company 53
Paul F. Nemes	Rescue Company 2
Robert E. Martin	Engine Company 36
David W. McCann	Engine Company 30
Thomas F. Kelly	Engine Company 8
John P. Hillery	Engine Company 56
John B. Moran, Jr.	Engine Company 34
Daniel B. Mahoney	Engine Company 40
David J. Cushing	Engine Company 5
Edward S. Saniuk	Ladder Company 30
Francis C. Prendergast	Engine Company 29
William J. Meyer	Ladder Company 6
Dennis L. McNally	Ladder Company 30
Thomas J. Hale	Ladder Company 22
Stuart B. Gear	Engine Company 1
Bernard T. Smith	Ladder Company 2
Robert J. Williams, Jr.	Engine Company 32
Leo P. Hughes	Engine Company 24
Ronald Carroll	Engine Company 56

Thomas K. Sylvester	Engine Company 33
Moses Pitts	Engine Company 50
Paul D. Fountaine	Engine Company 14
Michael A. Chavannes	Ladder Company 18
Daniel J. Kenneally	Engine Company 14
Llewellyn H. Bryant	Ladder Company 19

As of 1700 hours, Tuesday, July 7, 1981, the following named members will be terminated from their position:

Lineman John P. Fleming	Fire Alarm Division
Lineman John V. Frechette	Fire Alarm Division
Lineman James Mantville	Fire Alarm Division
Batteryman Daniel J. Morrill	Fire Alarm Division
Leather & Canvas Worker Paul S. Kabachus	Maintenance Division
Maintenance Mechanic Painter Paul W. Rivard	Maintenance Division
Maintenance Mechanic Painter Peter Massaro	Maintenance Division
Maintenance Mechanic Carpenter Paul R. Vogel	Maintenance Division

General Orders
No. 56

Headquarters, Fire Department
July 13, 1981

TERMINATION NOTICES

Due to Proposition 2½ which must be absorbed by all City departments and the lack of any definite State Aid to the City of Boston, I regretfully announce the following:

As of 0800 hours, Wednesday, July 15, 1981, the following named members will be terminated from their position of Fire Fighter:

Walter A. McPherson	Ladder Company 18
John M. Gallagher	Aerial Tower # 1
George H. Clark	Ladder Company 14
Patrick F. Foley, Jr.	Engine Company 36
Jairo Guzman	Engine Company 33
James L. Odom	Engine Company 11
Carey W. Havard	Engine Company 8
John L. Collins	Engine Company 4
Carlton E. Grady	Engine Company 30
Thomas P. Bell	Ladder Company 17
Daniel P. Delgardo	Engine Company 32
Steven C. Waldron	Ladder Company 6
Steven V. Swinson	Ladder Company 23
Thomas W. Russell	Ladder Company 17
Waymon Martin	Engine Company 9
David M. Pfeil	Ladder Company 2
Wendell Moy	Engine Company 5
Lawrence P. O'Donnell	Engine Company 48
Wayne C. Pearson	Engine Company 55
Paul J. Murphy	Engine Company 34
Jose R. Marichal	Engine Company 12
James F. Murphy	Engine Company 34

Marshall A. Smith	Engine Company 45
Peter A. Laizza	Ladder Company 16
Edwin Slater	Engine Company 42
John P. Joyce	Engine Company 11
Lawrence D. Kimble	Engine Company 51
Francis G. Jones	Ladder Company 26
George A. Gilchrist	Ladder Company 21
Edward J. Hobin	Ladder Company 15
Shelton Coats	Engine Company 20
James F. Gallagher	Ladder Company 2
Joseph M. Townes	Engine Company 4
Kevin J. Foley	Ladder Company 22
William J. Doherty	Ladder Company 8
Willie J. Davis	Engine Company 2
Richard G. Daley	Engine Company 29
Rudolph E. Edwards	Engine Company 49
Francis J. Orlandi	Ladder Company 26
Gerald Regnier	Engine Company 36
Richard F. Cook	Engine Company 53
Eric C. Watson	Engine Company 34
Gerard W. Buckley	Engine Company 14
Michael J. Arruda	Ladder Company 8
George E. Howard	Engine Company 40
Gary J. Miller	Engine Company 17
James Wright	Engine Company 3
Robert J. Greene	Engine Company 11
John Boswell	Engine Company 4

Members being terminated shall return all Department issue to the Training Division where they will be tagged and identified.

Members will be responsible for the return of their Department issue, such as fire helmet, coat, boots, mask face piece, uniform jacket, dress hat and corporation badge.

By order of Fire Commissioner/Chief George H. Paul

General Orders
No. 60

Headquarters, Fire Department
July 20, 1981

TERMINATION NOTICES

Due to Proposition 2½ which must be absorbed by all City Departments and the lack of any definite State Aid to the City of Boston, I regretfully announce the following:

As of 0800 hours, Wednesday, July 22, 1981, the following named members will be terminated from their position of Fire Fighter:

Leo D. Stapleton, Jr.	Engine Company 10
Richard N. McSweeney	Ladder Company 26
Carl W. Johnson	Ladder Company 11
James M. Foley	Engine Company 34
Francis J. Brown	Ladder Company 4
William A. Tobin	Ladder Company 29
Jame[illegible] D. Townes	Engine Company 40
Garret M. Stapleton	Engine Company 7
Ronald D. McCray	Engine Company 20
Kenneth R. D'Ambra	Engine Company 24
Antonio P. Timberlake	Ladder Company 8
John F. Kenney	Ladder Company 30
Fred Hunt	Engine Company 5
Joseph A. Kelley	Engine Company 24
Harold A. Bodden	Engine Company 55
James C. Feeney	Rescue Company 2
Robert P. Driscoll	Engine Company 7
Alvin A. Smith	Engine Company 53
John P. Bergamo	Ladder Company 1
Rodney W. Brooks	Engine Company 5
Paul C. Griffin	Ladder Company 17
Derek M. McMillan	Ladder Company 25
Robert L. Quinn	Ladder Company 21

Wilfredo Martinez	Engine Company 26
Michael J. Kelly	Ladder Company 2
Kevin M. Kelley	Ladder Company 8
Thomas R. Woods	Engine Company 12
William F. McCarthy	Engine Company 4
Ronald P. White	Engine Company 29
John Kisielius	Engine Company 17
Frederick C. Foster	Engine Company 36
Gerard J. Graul	Engine Company 33
Warren C. Whitaker	Engine Company 51
William T. Scannell	Ladder Company 22
Robert J. Gallagher	Engine Company 52
Michael G. Aylward	Ladder Company 16
Stephen J. Cummings	Aerial Tower # 1
Edward J. Coen	Engine Company 51
David R. Granara	Engine Company 9
Michael A. Grinkley	Ladder Company 15
Dwight Brown	Engine Company 33

Members being terminated shall return all Department issue to the Training Division where they will be tagged and identified. Members will be responsible for the return of their Department issue, such as fire helmet, coat, boots, mask face piece, uniform jacket, dress hat and corporation badge.

By order of Fire Commissioner/Chief George H. Paul

THE POLICE CASE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PEDRO CASTRO, ET AL

v. CIVIL ACTION No. 70-1220-W
No. 74-2982-C

NANCY B. BEECHER, ET AL

CONSENT DECREE

In accordance with the Opinion and Order of this Court, dated January 7, 1975, and with the assent of counsel, the Court hereby enters this Consent Decree.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

PRESENT CERTIFICATIONS

1. The Director of Civil Service (hereinafter Director shall mean the Director and his successors, or after July 1, 1975, the Personnel Administrator and his successors) shall on July 8, 1975 establish groups of police candidates in accordance with

Paragraph 2 of this Consent Decree, rank candidates within each group in accordance with Paragraph 3 of this Consent Decree, and certify police candidates as eligible for appointment to each appointing authority subject to Civil Service in accordance with Paragraph 4 of this Consent Decree.

2. The Director shall establish the following groups:

i. Group A shall consist of all Black and Spanish-surnamed applicants who failed any of the 1968-70 Police Entrance Examinations, but passed the 1972 Interim Police Entrance Examination and are otherwise qualified for appointment on the basis of existing requirements.

ii. Group C shall consist of all Black and Spanish-surnamed persons, excluding those in Group A, who passed the 1972 Interim Police Entrance Examination and are otherwise qualified for appointment on the basis of existing requirements.

iii. Group D shall consist of all other persons, excluding those in Groups A and C, who passed the 1972 Interim Police Entrance Examination and are otherwise qualified for appointment on the basis of existing requirements.

The eligible lists for all three groups shall expire on January 4, 1976. However, the City of Boston shall make no police officer appointments and accept no police officer transfers prior to January 5, 1976. If the eligible list based on the Examination scheduled to be administered in October, 1975 is not established by January 5, 1976, or if other circumstances prior to January 5, 1976 lead the City of Boston to believe it must hire, the City of Boston reserves its right to move this Court to authorize police officer appointments from the eligible list based on the 1972 Interim Police Entrance Examination. All parties fully anticipate that in the event the City of Boston is permitted to hire from the eligible list based on the 1972 Interim Police Entrance Examination after July 7, 1975, if the plaintiffs and the City of Boston cannot themselves agree upon compensatory relief, this Court shall order such limited addi-

tional compensatory relief beyond certification of one candidate from Group A for every candidate from Group B after the eligible list for the Examination scheduled to be administered in October, 1975, is established as it deems appropriate.

3. The Director, if petitioned by an appointing authority prior to certification to impose a residency preference pursuant to c. 31, s. 48A, shall impose such residency preference within each of the three groups described in Paragraph 3 of this Consent Decree.

4. The Director shall certify policy applicants as follows:

i. In response to requisitions submitted by appointing authorities, candidates shall be certified on the basis of one candidate from Group A for every candidate certified from Group D until the list of candidates in Group A is exhausted.

ii. Upon the exhaustion of Group A, candidates shall be certified to requisitioning appointing authorities on the basis of one candidate from Group C for every three candidates certified from Group D, until the candidates in Groups C and D are exhausted.

iii. Should a candidate qualify to be placed into Groups A, C or D after exhaustion of the Group for which he is eligible, said Group will be revived for purposes of affording the candidate the position he would have enjoyed.

iv. The Director shall not certify or approve appointments for positions of reserve police officer on any new or existing police reserve list.

5. The Director shall disapprove any appointment unless the appointing authority has furnished said Director with a written statement of the reasons for rejecting the appointment of any candidate higher on the list. Said Director shall furnish a written statement of these reasons to the plaintiffs' attorneys, and also to the candidate upon written request of the candidate.

RECRUITMENT

6. At least ninety (90) days prior to the administration of each future police entrance examination, the Director shall submit to the parties a plan detailing the Director's proposed affirmative program to recruit Black and Spanish-surnamed applicants. Said recruitment program shall include public statements, advertising in the media of press, radio, and television, direct contact with minority organizations; and, in advance of the Examination scheduled to be administered in October, 1975, training to prepare minority candidates to pass said Examination, provided that the Director receives an anticipated grant for minority recruitment from the United States Law Enforcement Assistance Administration. Said program shall also include a report containing, for each appointing authority, the number and percentage of Black and Spanish-surnamed police officers, provided that the report of the racial composition of each appointing authority may be submitted to the parties as late as thirty (30) days prior to administration of the Examination scheduled for October, 1975. The plaintiffs shall have fifteen (15) days to object to the Director's program. The Director shall have five (5) days to respond to plaintiffs' objections, if any, to the Director's program. Any dispute between the parties regarding the recruitment program, which cannot be resolved, will be resolved by this Court upon motion of any party. Any objection to the recruitment program, not made in writing within fifteen (15) days, shall be deemed to have been waived.

FUTURE EXAMINATIONS

7. The Director, in implementing this Consent Decree, shall administer on or before October 19, 1975 (hereinafter the

October Exam) a police written examination battery as described in a letter dated June 27, 1975 from the Director of Civil Service, Edward W. Powers, to the Attorney General of the Commonwealth of Massachusetts, Francis X. Bellotti, a carbon copy of which has been received by Thomas Mela, Esq. The contents of this letter, which identifies and explains the use of each examination component including the "ranking", "flagging" and "literacy" components shall remain confidential until after the administration of the October Exam so as not to compromise the security of said examination. Said Examination shall be administered to all police officer applicants to appointing authorities within the jurisdiction of Civil Service. Said Examination shall be administered only after said Director has satisfied the recruitment obligations imposed by Paragraph 6 of this Consent Decree.

8. The plaintiffs take no position with respect to the validition of the October Exam but agree to its use to establish an eligible list for the purpose of implementing this Consent Decree. The plaintiffs do not agree to administration of the October Exam after its administration in October, 1975, and the Director agrees that no police entrance examination shall be administered in the future unless it has been validated in conformity with the Testing Guidelines of the Equal Employment Opportunity Commission, 29 C.F.R. s. 1607.1, et seq.

9. With respect to the administration of the October Exam, the cut-off score for determining which candidates have passed said Exam will be set by agreement of the parties. The plaintiffs or the Director may submit the question of the appropriate cut-off scores on the "ranking" and "flagging" components of said Exam and, relative to the "flagging" instrument, the manner in which applicants may be subjected to further individualized psychological "screening," to this Court for resolution. In any event, the cut-off scores and "screening" should be set so that the method and ratios of cer-

tification described in Paragraph 23 of this Consent Decree can be implemented.

10. If subsequent to the administration of the October Exam it appears that pools A or B in Paragraph 21 below are inadequate or will become depleted so as to prevent the effectuation of the method and ratios of certification described in Paragraph 23 of this Consent Decree, the Director shall administer a second police entrance examination. It shall be left to the parties or the Court, upon motion of any party, to determine what examination will be given, which candidates will be eligible to take the examination, and the time period within which the examination will be given, provided that this Paragraph shall not effect the authority of the Director to select and hold regularly scheduled police entrance examinations in contemplation of the expiration of an eligible list as provided by Massachusetts law.

11. Spanish-surnamed applicants for the October Exam will be given the option of taking said Exam in Spanish. However, the Director shall require such persons who take said Exam in Spanish to pass a literacy test to demonstrate their ability to read and write the English language.

12. Within thirty (30) days after the administration of said literacy test, the Director shall submit to the parties a report showing the number of individuals who took the October Exam in Spanish, and the pass/fail rate of those individuals on the literacy test.

13. All candidates who take the October exam shall be informed, individually, and in writing, prior to the time that eligibility lists are established, that they are required to meet the following criteria before they can be appointed:

a. Receive a passing mark on the October Exam. Those individuals who take the October Exam in Spanish must pass the literacy test.

b. Pass a medical examination. It will be noted that said medical examination will be available for inspection at the office of the Director.

c. Be determined by the Director to be of good moral character. It will be noted that a copy of the Standards and Procedures for the Screening of Ex-offenders will be available for inspection at the office of the Director.

d. Provide a certificate of birth or other evidence of date and place of birth satisfactory to the Director.

Further, each candidate shall receive, at the time provided above:

e. A list of all appointing authorities which require an applicant to have a driver's license.

f. A list of all appointing authorities which have a minimum height requirement.

g. A list of all appointing authorities which require an applicant to pass a swim test.

The Director fully anticipates funding the the United States Law Enforcement Assistance Administration with which to employ a College Intern during twenty (20) hours per week for the life of the eligibility list based on the October Exam, who will be responsible for establishing and maintaining contact with Black and Spanish-surnamed candidates and for assisting said candidates to satisfy the criteria described in this Paragraph.

14. The eligibility list established as a result of the October Exam shall be established within six (6) months of said Exam and shall expire two years from the date said list is first established.

15. Nothing in this Consent Decree shall be construed to limit the authority of the Director to delegate the administration of Civil Service functions so far as practicable to the cities and towns, nor to limit the right of the plaintiffs to move this Court to modify any entrance requirement with the exception

of the October Exam itself, whether imposed or delegated by the Director, provided that any Black or Spanish-surnamed person who failed a Police Entrance Examination administered by the Director between 1968 and 1970 and was then eligible on account of age shall be eligible to take the October Exam, notwithstanding his failure to meet the current age requirements.

16. At each future police entrance examination (which, hereinafter, shall include the said October Exam), the Director shall require all candidates for police officer positions to provide under penalty of perjury the following information: Whether the candidate is (a) caucasian (white); (b) black; (c) Spanish-surnamed (i.e., the candidate was born in a Spanish-speaking country or if the candidate was raised in a home where the primary language was Spanish); (d) other. Within sixty (60) days after the administration of each future police entrance examination, the Director shall furnish the parties with a summary of the racial composition of the candidates examined.

17. Within sixty (60) days after each future police entrance examination has been graded, the Director shall submit a report to the parties showing the results by race of all persons taking said examination, and the name, address, and grade of each Black or Spanish-surnamed individual. The parties shall also receive an item analysis of the results of the said examination, by race.

18. The Director shall notify the plaintiffs and supply evidence to the plaintiffs whenever a particular appointing authority has informed the Director that it has achieved a complement of Black and Spanish-surnamed post-probationary police officers commensurate with the percentage of minorities within the community or that the appointing authority is serving a jurisdiction with less than one per cent (1%) Black and Spanish-surnamed population. The plaintiffs

shall have thirty (30) days to object to the evidence contained in the Director's notification. If such objection is not made within thirty (30) days the particular appointing authority will no longer be subject to Paragraph 23 of this Consent Decree, and certification to that appointing authority will be made according to existing Massachusetts law. Any disputes between the parties in this regard which cannot be resolved by the parties will be resolved by this Court upon motion by any of the parties.

19. Following establishment of the eligibility list based on each future police entrance examination, and every six (6) months thereafter, plaintiffs will be furnished with a copy of the eligibility list for each appointing authority subject to the jurisdiction of the Director. Further, plaintiffs will receive from the Director the following information:

On a monthly basis:

(a)) A copy of the requisition, certification, and report on certification for each requisitioning appointing authority.

(b) The name of each Black and Spanish-surnamed candidate from said eligibility list whose employment is terminated.

(c) The name of each police officer whose transfer between appointing authorities has been approved by the Director subsequent to the date of this Consent Decree.

Every three months:

(d) The name and address of each Black and Spanish-surnamed candidate who has passed a future police entrance examination, including the status of each such candidate's elibility, and, if any such candidate is ineligible, the reasons therefor.

FUTURE CERTIFICATIONS

20. Subsequent to obtaining the results of each future police entrance examination, the Director shall promptly establish groups of police candidates in accordance with Paragraph 21 of this Consent Decree, rank candidates within each group in accordance with Paragraph 22 of this Consent Decree, and certify police candidates as eligible for appointment to each appointing authority subject to Civil Service in accordance with Paragraph 23 of this Consent Decree.

21. The Director shall establish the following groups:

i. Group A shall consist of all Black and Spanish-surnamed applicants who pass a future police entrance examination and are otherwise qualified for appointment on the basis of existing requirements.

ii. Group B shall consist of all other persons who pass a future police entrance examination and are otherwise qualified for appointment on the basis of existing requirements.

Eligible lists shall expire two years from the date of their establishment.

22. The Director, if petitioned by an appointing authority prior to certification to impose a residency preference pursuant to c. 31, § 48A, shall impose such residency preference within each of the two groups described in Paragraph 21 of this Consent Decree.

23. The Director shall certify police applicants as follows:

i. In response to requisitions submitted by the appointing authorities of the cities of Boston and Springfield, candidates shall be certified on the basis of one candidate from Group A for every candidate certified from Group B.

ii. In response to requisitions submitted by all other appointing authorities subject to Civil Service, candidates shall

be certified on the basis of one candidate from Group A for every three candidates from Group B.

iii. Should a candidate qualify to be placed into Group A or Group B after exhaustion of the Group for which he is eligible, said Group shall be revived for purposes of affording the candidate the position he would have enjoyed.

iv. Should an appointing authority fail to offer an appointment to a candidate, the Director shall disapprove any appointment unless said appointing authority has furnished said Director with a written statement of the reasons for rejecting the appointment of any candidate higher on the list. Said Director shall furnish a written statement of those reasons to the plaintiffs' attorneys, and also to the candidate upon written request of the candidate.

v. Should there be any modification of Rule 14 of the Civil Service Rules, the parties shall monitor the effect of any such change on the purposes and intent of said Decree for a period of six months. If, at the end of this time, any party is of the opinion that such modification of Rule 14 is frustrating the implementation of the method and ratios of certification described in this Paragraph, the parties will enter into negotiations to modify the method and ratios of certification or other aspects of this Consent Decree in order to effectuate the compensatory relief of said Decree. If, after the six month period has elapsed, the parties cannot themselves agree upon such modifications in said Decree, this Court shall order such additional compensatory relief beyond the method and ratios of certification as described in this Paragraph as it may deem appropriate.

24. The method and ratios of certification described in Paragraph 23 of this Consent Decree shall apply to all eligibility lists established subsequent to future police entrance examination, and shall apply to all cities and towns subject to Civil Service law which have a minority population of one per

cent (1%) or more and shall apply to the Capitol Police, the M.B.T.A. Police and the M.D.C. Police. As a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certification will be made according to existing Massachusetts law, and as the Capitol Police achieves a complement of minorities commensurate with the percentage of minorities within the City of Boston, and the M.B.T.A. Police or the M.D.C. Police achieves a complement of minorities commensurate with the percentage of minorities within the jurisdiction served by the M.B.T.A. Police or the M.D.C. Police, certification will be made in accordance with existing Massachusetts law, provided that appointing authorities under the jurisdiction of Civil Service shall, pursuant to this Paragraph, be exempted only from subparagraphs i, ii, iii, and v of Paragraph 23 of this Consent Decree.

25. The Court retains jurisdiction of this case.

/s/ _____
CAFFREY, C. J.

Dated: June 27, 1975

SUPPLEMENTAL CONSENT DECREE

This Court, having approved and entered a Consent Decree in this action on July 7, 1975, to allow a new police officer entrance examination to be given, and said examination having been given in October, 1975, the parties agree to this Supplemental Consent Decree to permit the marking of said examination and the establishment of an eligibility list for the position of police officer in the Commonwealth of Massachusetts.

The parties agree that:

1. In accordance with the criteria set forth in Paragraph 18 of the July 7, 1975, Consent Decree and on the basis of (1) 1970 United States Census Bureau population figures for Massachusetts cities and towns, as supplemented by both the 1973 United States Census Bureau figures and the 1974 Massachusetts Secretary of State's Census of Spanish-speaking population and (2) data provided by each of the Commonwealth's police departments, regarding the percentage of Black and Spanish-speaking police officers in each such police department, those 81 police departments listed in defendant's letter to plaintiffs, dated June 8, 1976, shall no longer be subject to the method and ratios of certification described in Paragraph 23 of the July 7, 1975, Consent Decree.

2. All applicants who achieved a score of 61% or higher will be deemed to have passed the October, 1975, police examination. The Division's rationale for setting the passing score at 61% is set forth in Attachment A.

3. The Division recognizes that the police examination administered in Spanish was not correctly translated from English into Spanish, and thus was a faulty examination. Therefore, the Division agrees that the results of the police examination administered in Spanish are void. The Division recognizes that each candidate who took the examination in

Spanish had to also pass a literacy test. The Division agrees to retest the 102 candidates who took the examination in Spanish and received a passing score on the literacy test. The re-examination will be given on or about June 19, 1976, and the passing score for the examination will be 61%.

4. The Division agrees to administer another police officer entrance examination in the city of Springfield, as soon as it becomes evident that there will not be sufficient names to meet the method and ratios of certification described in Paragraph 23 of the July 7, 1975, Consent Decree. The Division will immediately canvass the list of eligible minority candidates to determine the number who actually are willing to accept appointment to the Springfield Police Department. The test will be the IPMA Police Examination and the passing score will be the same as the one set as a result of the October, 1975, police officer entrance examination (i.e. 61%). The Division agrees to undertake a minority recruitment effort in order to attract qualified candidates. In determining whether or not a new test must be given, the Division will take into account the anticipated vacancies in the Springfield Police Department as well as the number of successful minority candidates on the October, 1975, police officer entrance examination who, in response to the said canvass, affirmatively indicate a willingness to accept employment with the Springfield Police Department. A second police examination will be given in other jurisdictions, if necessary, in accordance with Paragraph 10 of the July 7, 1975, Consent Decree.

5. With the exception of police departments which are no longer subject to the method and ratios of certification described in Paragraph 23 of the July 7, 1975, Consent Decree, the Division shall certify names of minority candidates based on the ratio of one minority to three individuals who are currently employed in less than full-time capacity with a police department. Thus, in effect, when a full-time vacancy occurs

on a police force, three individuals currently on the reserve roster will be certified with one minority from the list established as a result of the October, 1975, police examination.

6. The Division agrees that once an individual receives a full-time appointment from any list established as a result of the October, 1975, police examination, that individual's name will be removed from all other police lists. Thus, in effect, an individual who accepts employment in any police department will be immediately removed from all other such police lists.

7. In accordance with Paragraph 13 of the July 7, 1975, Consent Decree, the Division agrees to conduct a follow-up program regarding all minority candidates who pass the October, 1975, police examination, to insure that said candidates are kept apprised of their status with regard to the eligible list, including individual notices regarding failure to satisfy the criteria set forth in said Paragraph 13. The Division agrees to apply for LEAA funds in order to accomplish this follow-up. However, in the event that funds are not forthcoming from LEAA, the Division hereby agrees to use its own resources in conducting this program.

8. The Division shall require that police departments submit to the Division a list of proposed appointees from a certification. The Division will screen each proposed appointee to make sure that he meets the requirements set forth in the Standards and Procedures for the Screening of Ex-Offenders, provided that the Division will exclude, prior to certification, in accordance with M.G.L. c. 41, § 96A, any candidate known to be a felon who has not been granted a pardon therefor. A proposed appointee who is removed from the eligibility list will be replaced on the certification, in conformity with the method and ratios of certification described in Paragraph 23 of the July 7, 1975, Consent Decree. An individual who may be removed from the eligibility list by the

Division shall first be notified in writing of his right to a hearing before the Personnel Administrator or his delegate, and then be notified in writing of his right to a hearing upon appeal before the Civil Service Commission.

9. The Division shall administer a medical examination to each applicant being considered for certification. An applicant who fails said examination shall be removed from the eligible list and shall have the right to be tested by a Medical Review Board. At the time of his failure of his first examination, said applicant shall be informed in writing, of the right to be retested by a Medical Review Board. An applicant who, after failing his first medical examination, appeals to the Medical Review Board and is found medically unfit by the Medical Review Board, shall be removed from the list of those applicants being considered for certification, provided that an applicant may file his appeal to the Medical Review Board at any time within six months of the date of the original medical examination, and further provided that appeals will be processed and completed within thirty days of the time an appeal is filed. An applicant who fails a medical examination administered by an appointing authority according to guidelines promulgated by the Division, shall be removed from the list of applicants eligible for appointment and shall be so notified. Such applicant may file an appeal to the Medical Review Board at any time within six months of the date of the medical examination administered by the appointing authority. That appeal shall be processed and completed within thirty days of the time the appeal is filed. Approval of appointments made by an appointing authority shall not be delayed pending appeal.

10. The Division shall provide individual applicants with their score on the police examination administered in October, 1975, but shall not give the scores of an individual or groups of individuals to an appointing authority.

11. Should an appointing authority whose department is not listed in defendant's letter to plaintiffs, dated June 8, 1976, fail to offer an appointment to a candidate, the Division shall disapprove any appointment unless said appointing authority has furnished said Division with a written statement of the reasons for rejecting the appointment of any candidate higher on the list. Said Division shall furnish a written statement of the reasons to the plaintiffs' attorneys, and also to the candidate upon request of the candidate.

12. The parties agree to meet periodically to review the implementation of this Supplemental Consent Decree, including consideration of the effect of post-certification procedures and tie scores on the method and ratios of certification described in Paragraph 23 of the July 7, 1975, Consent Decree.

Agreed to this 8th day of June 1976.

CAFFREY, C.J.

July 13, 1976

ATTACHMENT A

(See Paragraph 2 of Attached Supplemental Consent Decree)

The Division hereby states that the reasons for setting the passing score at 61 on the October, 1975, police officer entrance examination are as follows:

1. The guidelines on employee selection procedures established by the Equal Employment Opportunity Commission provide that cut-off scores on examinations should normally be set so as to be reasonable and consistent with normal expectations or proficiency within the work force. Other facts may also be considered in determining cut-off scores including the relationship between the number of vacancies and the number of applicants and the degree of adverse impact.
2. The validation study which was conducted in conjunction with the IPMA police examination showed that the marks on the police officer's examination were considerably higher than the marks on the IPMA firefighter entrance examination.
3. The IPMA police examination tested approximately 60% of the cognitive dimensions of the position of Police Officer.
4. The scores on the IPMA police examination have been found to have a positive relationship with job performance and a score of 61 is reasonably consistent with normal expectations of proficiency within the work force.
5. The passing score of 61 provides a sufficient number of candidates in order to set the requirements of the priority pools.

AGREEMENT AS TO MAY, 1978 EXAMINATION

This Court having approved and entered a Consent Decree in this action on July 7, 1975, and a Supplemental Consent Decree on July 13, 1976, and the Defendant Personnel Administrator having given a new police officer entrance examination in May 1978, the parties agree as follows:

1. In accordance with the criteria set forth in paragraph 24 of the 1975 Consent Decree, and on the basis of data provided by each of the Commonwealth's police departments regarding the percentage of Black and Spanish-surnamed police officers in each such department, only those police departments listed in Attachment A shall remain subject to the method and ratios of certification described in paragraph 23 of the 1975 Consent Decree.

2. All applicants who achieved a score of sixty one percent (61%) or higher will be deemed to have passed the May, 1978 police examination.

3. Once an individual receives a full-time appointment from any list established as a result of the May, 1978 police examination, that individual's name will be removed from all other police lists. Thus, an individual who accepts employment in any other police department will be immediately removed from all other police lists.

4. Applicants who took the May, 1978 examination in Spanish and who then took the September, 1978 Spanish reexamination will be certified at the higher scores received.

5. Whenever, pursuant to Personnel Memorandum 78-15 issued by the Personnel Administrator on December 27, 1978, as it may be amended (Attachment B), the Personnel Administrator receives from an appointing authority a proposed plan for medical or psychological/ psychiatric examinations, prior to approval, he will furnish a copy of the plan (including any modifications) to plaintiffs. Plaintiffs will then have not less

than fifteen (15) days to present their written comments, if any, to the Personnel Administrator regarding the plan. Thereafter the Personnel Administrator shall approve or disapprove the plan and shall promptly inform plaintiffs as to his decision.

6. Applicants being considered for certification shall be given a pre-certification medical examination by the Division of Personnel Administration or an appointing authority to whom this function has been delegated, applying the standards promulgated by the Division of Personnel Administration. An applicant who fails either the pre-certification examination or a pre-employment examination administered by an appointing authority applying the standards promulgated by the Division, shall be removed from the list of applicants eligible for appointment, and shall be so notified. Such applicant shall have a right to have his condition reviewed by a Medical Review Board, provided he applies for review at any time within six (6) months of the date of the examination the applicant failed. The application for review shall be processed and completed within thirty (30) days after filing. Certifications and/or approval of appointments made by an appointing authority shall not be delayed pending appeal.

7. The Division of Personnel Administration will give a new police examination for at least the cities of Boston, Holyoke, Lawrence, Springfield, and Worcester not later than December 1, 1979.

8. Within sixty (60) days after the administration of a new police entrance examination for the City of Boston, the Division of Personnel Administration will provide to the Boston Police Department and the plaintiffs, a list of the names and addresses of all candidates taking the examination who claim Boston residency preference. This list will be ranked according to test score and will include information for all candidates claiming status as a veteran, disabled veteran, and/or

minority. The Boston Police Department agrees to supply limited technical data processing and/or clerical assistance to the Division of Personnel Administration to assist in preparing this information within the time limits provided.

It is understood by the parties that the Boston Police Department will use this information to begin the preliminary screening of candidates for appointment, while the plaintiffs and state defendants negotiate the passing score. The Boston Police Department will provide to the Division of Personnel Administration all information concerning candidates from the list necessary or helpful in verifying candidates' age, education, residency, veteran's status, minority status and medical condition, in order to facilitate the early establishment of the eligible list for the City of Boston based upon the new examination. The eligible list for the City of Boston will be established as soon as practicable after agreement on a passing score is reached, and will not be delayed pending establishment of eligible lists for other cities for which the new examination is administered.

9. The Division of Personnel Administration will provide the plaintiffs with detailed results of the new police examination within 60 days of administration, including a copy of the examination and proposed passing score. The plaintiffs and state defendants will then enter intensive negotiations to reach an examination agreement. Lists for the five named cities based on the new police examination will be established within 60 days after that agreement is reached.

10. At least one hundred and twenty (120) days prior to the administration of the new police entrance examination, the Personnel Administrator shall submit to the parties a plan detailing the Personnel Administrator's proposed affirmative program to recruit Black and Spanish-surnamed applicants. The recruitment program shall go into effect at least ninety (90) days prior to administration of the new examination. It

shall include public statements, advertising in the media of press, radio, and television, direct contact with minority organizations; and, in advance of the examination scheduled to be administered in 1979, training to prepare candidates for that examination.

The plaintiffs shall have fifteen (15) days to object to the Personnel Administrator's program. The Personnel Administrator shall have five (5) days to respond to plaintiffs' objections, if any. Any objection to the recruitment program not made in writing within fifteen (15) days, shall be deemed to have been waived.

11. Before initiating recruitment and training for the new examination the Division of Personnel Administration will administer a study designed to determine why a significant number of minority candidates, who were recruited and who signed up to take the May, 1978 examination, failed to actually take that examination. The results of the study shall be forwarded to counsel for the plaintiffs and will be taken into consideration by all parties when recruitment for the new 1979 examination is planned.

12. Should an appointing authority listed in Attachment A fail to offer an appointment to a willing candidate, the Division of Personnel Administration shall disapprove any appointment unless that appointment authority has furnished the Division with a written statement of the reasons for failing to make the appointment of any candidate higher on the list. The Division of Personnel Administration shall furnish a written statement of the reasons to the plaintiffs' attorney, and also to the candidate upon request of the candidate. The Personnel Administrator agrees to notify any candidate removed by same from a certified list, pursuant to Civil Service Commission Rule 15(2), that such action does not affect the candidate's right to be certified to any appointing authority which has not previously requested his removal for the reasons approved by

the Personnel Administrator, and to notify such candidate of his right to appeal to the Civil Service Commission.

13. The Personnel Administrator shall require that the appointing authority for each of the departments named in Attachment A, at the time such appointing authority files its report of the names of candidates to be appointed, certify that it has informed in writing each candidate who appeared for possible appointment of the status of his candidacy (i.e. "bypassed", "removed", or "disqualified").

14. The Personnel Administrator shall require that the appointing authority for each of the departments named in Attachment A, at the time such appointing authority is considering candidates on a certified list, substitute for each candidate in Group A or Group B who does not report his willingness to accept appointment, is disqualified or removed, the next ranked candidate in Group A or Group B, respectively.

15. The Personnel Administrator shall require that the appointing authority for each of the departments named in Attachment A, at the time such appointing authority files its report of the names of candidates to be appointed, certify that it has informed in writing each candidate who was by-passed for appointment that if such candidate believes that the reasons stated for bypass are either untrue or are a pretext for unlawful reasons, and if such information is transmitted to the Personnel Administrator with no resulting action, the candidate may appeal to the Civil Service Commission.

16. The Personnel Administrator shall furnish to the plaintiffs' attorney, three (3) days prior to mailing to the appointing authority, a copy of the certified list to be sent to any of the departments named in Attachment A.

17. The plaintiffs take no position with respect to the validity of the May, 1978 police entrance examination but agree to its use to establish an eligibility list for the purpose of implementing the method and ratios of certification described

in the Consent Decree. The plaintiffs do not agree to future administration of the May, 1978 examination, and the Personnel Administrator agrees that no police entrance examination shall be administered in the future unless it has been validated in conformity with the Uniform Guidelines on employee selection as jointly published by Office of Personnel Management, Equal Employment Opportunity Commission, Department of Labor, Department of Justice and Treasury Department.

18. The eligible list established as a result of the May, 1978 examination shall expire two years from the date the list is first established.

19. The parties agree to meet periodically to review the implementation of this Agreement.

20. The parties agree that any dispute under this Agreement which cannot be resolved by the parties will be resolved by this Court upon the motion of any party.

/s/ _____

Approved, CAFFREY, J.

Dated: May 18, 1979

ATTACHMENT A

Acton
Andover
Attleboro
Bedford
Bellingham
Belmont
Beverly
Billerica
Boston
Bourne
Brockton
Brookline
Burlington
Cambridge
Chelsea
Chicopee
Clinton
Dartmouth
Duxbury
E. Longmeadow
Easthampton
Everett
Fall River
Falmouth
Foxborough
Franklin
Gloucester
Greenfield
Groton
Hanover
Hanson
Haverhill
Holbrook
Holden
Holliston
Holyoke
Hudson
Ipswich
Kingston
Lancaster
Lawrence
Lexington
Leominster
Lowell
Ludlow
Lynn
Marblehead
Marlborough
Marshfield
Medford
Methuen
Natick
Needham
New Bedford
North Adams
North Andover
Northampton
Norton
Palmer
Peabody
Pembroke
Pittsfield
Randolph
Revere
Rockland
Salem
Sandwich
Saugus
Scituate
Sharon
Shrewsbury
Southbridge
South Hadley
Springfield
Stoneham
Stoughton

ATTACHMENT A (*continued*)

Sudbury
Swampscott
Taunton
Tewksbury
Waltham
Wareham
Watertown
Webster
Wellesley
W. Springfield
Westfield
Weston
Westwood
Whitman
Williamstown
Winchester
Winthrop
Woburn
Worcester
MBTA
MDC
Capitol Police

PLAINTIFFS' MOTION TO MODIFY PRIOR REMEDIAL ORDERS

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, plaintiffs move for an order, in the form attached herewith, of modification of prior remedial orders entered by this court. Pursuant to local rule 12(c), plaintiffs hereby request oral argument on this motion. Plaintiffs believe that two hours will be sufficient for all parties to be heard.

STIPULATION

Plaintiffs and defendants herein hereby stipulate to the following facts in conjunction with this Court's determination of the pending Motion to Modify Prior Remedial Orders. In so stipulating, the parties expressly reserve their right to contest the materiality or relevance of any fact herein stipulated. The parties reserve their right to present to the Court additional facts by affidavit or other means.

1. According to Boston Police Department records:

(a) Since 1974, the Boston Police Department has hired a total of 492 police officers.

(b) of these, 213 are black and Hispanic, representing forty-three (43) percent of the officers hired since 1974.

(c) The following chart shows annual hiring by the Boston Police Department since 1971:

	Total Hired	*Blacks and Hispanics Hired*	*Percent Blacks and Hispanics Hired*
1971-3	20	0	--
1974	65	26	40 percent
1975	51	22	43 percent
1976-77	0	0	--
1977-78	126	61	48 percent
1979-80	250	104	42 percent

2. On July 6, 1981, the Boston Police Department employed a total of 1912 sworn officers, of whom 224 (11.7 percent) are black or Hispanic.

3. According to the *Advance Reports 1980 Census of Population and Housing: Final Population and Housing Unit Counts* issued by the Bureau of the Census and the United

States Department of Commerce, minorities constitute approximately 29 percent of the population of the City of Boston.

4. On July 7, 1981, the Boston Police Department commenced a systematic program of reductions in force of uniformed police officers. This program has proceeded and is intended by City and Police Department officials to proceed as set forth in this stipulation.

5. On July 7, 1981, 33 sworn personnel in the Boston Police Department, of whom 4 (12.1 percent) are black of Hispanic, were removed from the payroll. (Exhibit A). As a result of this reduction in force, the total number of sworn personnel in the Boston Police Department was 1879, of whom 220 (11.7 percent) are black or Hispanic.

6. On July 14, 1981, 44 additional sworn personnel in the Boston Police Department, of whom 22 (50 percent) are black or Hispanic, were removed from the payroll. (Exhibit B). As a result of this reduction in force, the total number of sworn personnel in the Boston Police Department was 1835, of whom 198 (10.8 percent) are black or Hispanic.

7. On July 21, 1981, 44 additional sworn personnel in the Boston Police Department, of whom 24 (55 percent) are black or Hispanic, were removed from the payroll. (Exhibit C). As a result of this reduction in force, the total number of sworn personnel in the Boston Police Department was 1791, of whom 174 (9.7 percent) are black or Hispanic.

8. On July 28, 1981, 41 additional sworn personnel in the Boston Police Department, of whom 24 (58 percent) are black or Hispanic, were removed from the payroll. (Exhibit D). As a result of this reduction in force, the total number of sworn personnel in the Boston Police Department is 1750, of whom 150 (8.6 percent) are black or Hispanic.

9. The City of Boston has prepared a schedule for additional lay-offs of sworn personnel in the Boston Police Department to occur in groups by class on a weekly basis. This plan

for additional reductions in force will be implemented as follows:

(a) On or by August 4, 1981, 31 additional sworn personnel, of whom 19 (61 percent) are black or Hispanic, will be removed from the payroll, leaving 1719 sworn personnel in the Department, of whom 131 (7.6 percent) are black or Hispanic.

(b) On or by August 18, 1981, 59 additional sworn personnel, of whom 28 (47 percent) are black or Hispanic, will be removed from the payroll, leaving 1660 sworn personnel in the Department, of whom 103 (6.2 percent) are black or Hispanic.

10. The collective bargaining agreement between the City of Boston and the Boston Patrolman's Association contains no express provisions as to the manner in which layoffs are to be accomplished.

11. The Boston Police Department intends the reduction in force referenced above to comply with the provisions of Mass. Gen. Laws ch. 31, §§ 39 and 41.

PEDRO CASTRO, ET AL.
By their attorneys,

Dated: July 29, 1981

EXHIBIT A

BOSTON POLICE

P. O. Box No. 81-141

PERSONNEL ORDER — Lay Off

July 7, 1981

The following employees are separated from service in the Boston Police Department because of lack of money, effective at the close of business July 7, 1981. They retain reinstatement rights, pursuant to Massachusetts General Law, Chapter 31, Section 39.

Police Officer	I.D.#	District
Thomas J. Adams	8450	District D
Lawrence P. Applegate	8451	District C
Philip V. Berte	8453	District B
Thomas P. Boyle	8454	District B
Robert C. Brown	8455	District C
Mark B. Buchanan	8456	District B
Harry A. Byrne, Jr.	8457	District B
Richard P. Caulfield	8458	District C
James M. Cook	8460	District B
Catherine A. Crowley	8130	District A
Dennis E. Doherty	8461	District B
Paul J. Durkin	8463	District B
Richard F. Ford	8465	District B
Sherman C. Griffiths	1246	District B
George W. Higgins	8466	District C
James M. Hussey	8467	District B
John M. Joyce	8468	District E
Stephen P. McGrath	8470	District A
Gerard P. McHale	8471	District A

EXHIBIT A (*continued*)

Police Officer	I.D.#	District
Timothy J. McKenzie	8472	Operations
Louis H. Metaxas	8473	District B
Robert A. Moody	8474	District B
Richard T. Mosey	8475	District B
Kevin T. Mullen	8476	District C
Dale T. O'Donnell	8477	District C
Paul T. Perry	8480	District E
William W. Rivers	6923	District C
John F. Rooney	8482	District B
Thomas F. Rose	8483	District B
Joseph G. Scaringello, Jr.	8484	District E
George C. Thomas	8486	District B
Frances W. Thompson	8487	District C
Joseph J. Zinck	8490	District D

JOSEPH M. JORDAN
Police Commissioner

EXHIBIT B

BOSTON POLICE

P. O. NO. 81-145

PERSONNEL ORDER — Layoff

July 13, 1981

The following-named Police Officers are hereby separated from service in the Boston Police Department because of lack of money, effective at the close of business on Tuesday, July 14, 1981. They retain reinstatement rights, pursuant to Massachusetts General Laws, Chapter 31, Section 39.

Police Officer	I.D.#	Assignment
Gladys R. Acuino	7061	Auto Maintenance Unit, B.A.S.
Deborah P. Austin	8288	District B
Beatrice Barron	8289	Persn. Div., Med. Incap. Sec.
Michael A. Bell	8290	District B
Robert J. Bowes Jr.	8291	District D
Eric R. Braxton	8292	District C
Leon J. Buckley	8293	District B
William F. Carroll	8294	District B
Paul C. Cato	8295	District B
John J. Connolly	8296	District A
Timothy V. Connors	8297	District C
Anthony G. Corbett	8298	M.O.F.
Linda B. Cowan	8299	District A
Diana M. Dozier	8301	District B
George F. Egan	8303	District B
John W. Glenn, Jr.	8304	District D
Russell J. Grant	8306	District C
John A. Ham	8308	District B
Kathleen M. Horton	8309	District A

EXHIBIT B (*continued*)

Police Officer	I.D.#	Assignment
Paul M. Ivens	8310	District D
John B. Kelly	8311	District B
John A. Klokman	8312	District A
Robert W. Lockhert	8313	District C
William Lopez	8314	District C
Lawrence E. Martinez	8315	District C
Francis K. Matthews	8316	District B
Richard E. Meade	8317	District B
Raymond R. Mosher	2329	District E
Robert Newton, Jr.	8319	District B
Karen M. Nixon	8320	District B
John F. Nolen, Jr.	8321	District B
James P. O'Shea	8322	District D
Kenneth A. Peters Jr.	8323	District B
Anthony M. Pettus	8324	District A
Richard E. Priest Jr.	8325	District B
Carmen A. Rodriquez	8326	District C
Maria E. Rodriguez	8334	Operations
William T. Rogers	8327	District B
Robert G. St. Peter	8330	Persn. Div., Med. Incap. Sec.
Pamela R. Smith	8328	Persn. Div., Ext. Leave Sec.
Rhethia Y. Stewart	8329	District C
Lynnette Sumpter	8332	District B
Nadine A. Taylor	8333	District B
Stephen C. Vermette	1303	District A

JOSEPH M. JORDAN
Police Commissioner

EXHIBIT C

BOSTON POLICE

P. O. NO. 81-156

PERSONNEL ORDER — Layoff

July 22, 1981

The following-named Police Officers are hereby separated from service in the Boston Police Department because of lack of money, effective at the close of business on Tuesday, July 21, 1981. They retain reinstatement rights, pursuant to Massachusetts General Laws, Chapter 31, Section 39.

Police Officer	I.D.#	Assignment
Vincent R. Adduci, Jr.	1430	District D
Seifuddin N. Akram	8202	District B
Henry W. Barron	8203	District A
Joseph C. Britt	8204	District D
Joseph H. Browning	1521	District B
Michael V. Butler	8205	District D
Clovis L. Cobb	8206	District D
Herman N. Cole	8207	District C
Orrin C. Crooms	7901	District D
Michael E. Curry	8208	District E
Thomas A. Dowd	8210	District E
Sandra E. Ellis	8211	District D
Joseph A. Favale	7038	District A
Anthony V. Feudo	1245	District E
Edward L. Fleming	8214	District C
Dino A. Gonzalez	8215	District C
Gary C. Greenwood	1285	District A
Robert F. Groblewski	8217	District E
Frederick W. Hirst	8218	District A
Carol E. Hullum	8212	District B

EXHIBIT C (*continued*)

Police Officer	I.D.#	Assignment
Gus Irby	8216	District B
Charles M. Johnson	8219	District B
Bernard M. Kelly	1294	District C
William M. Kenricken	8221	District B
William V. Kennedy	8224	District E
Richard W. Laham	1225	District A
Joseph P. Lally	8222	District A
John J. McCarthy III	1322	District C
Joseph K. McNiff	8223	District C
Christopher A. Moreno	8225	District A
Ronald F. Myers	8226	District B
Ronald M. Nelson	8227	District B
Michael M. Primm	8228	District C
Paul Rogers	8230	District D
Alicia B.C. Schepici	8231	District D
Donta P. Singleton	8232	Persn. Div., Med. Incap. Sec.
Patricia A. Skeen	8233	Persn. Div., Ext. Leave Sec.
Michael K. Sparks	8234	District C
Ellen Stone	8235	District A
Ellis E. Thornton	8236	District A
Robert E. Tinker	8237	District A
John T. Watts	8238	District D
George White, Jr.	7373	District C
Paul R. Wilson	8239	Persn. Div., Med. Incap. Sec.

JOSEPH M. JORDAN
Police Commissioner

EXHIBIT D

BOSTON POLICE

P. O. NO. 81-158

PERSONNEL ORDER — Layoff

July 24, 1981

The following-named Police Officers are hereby separated from service in the Boston Police Department because of lack of money, effective at the close of business on Tuesday, July 28, 1981. They retain reinstatement rights, pursuant to Massachusetts General Laws, Chapter 31, Section 39.

Police Officer	I.D.#	Assignment
David M. Allen.	7988	Persn. Div., Med. Incap. Sec.
Terrace L. Avery	7989	District C
Robert W. Baird	7990	District D
Bonita L. Bishop	7991	District C
Richard W. Bourque, Jr.	7993	Operations
Marcia A. Bowles	8001	District B
Richard B. Caines, Jr.	7994	District B
Leverne Cameron	7995	District C
Joyce G. Chase	7997	District D
Thomas A. Cosby, Jr.	1480	District B
Harold H. Diggs, Jr.	8002	District E
John C. Foote	8005	District B
Robert M. Ford	8006	District C
John F. Gallagher, Jr.	1295	District D
Ivan P. Gonzalez	8007	District E
Rudy Guity	8008	District D
Suzanne E. James	8033	District B
Kevin D. Jones	8011	District D
Ricky R. Jones	7999	District E

EXHIBIT D (*continued*)

Police Officer	I.D.#	Assignment
Richard M. Keefe	8012	District D
Horace N. Kincade	8013	District E
Adalberto E. Lio	8014	District E
Peter T. Lydon	8015	District D
Timothy E. Lynch	8016	District C
Steven W. McFarland	8017	District E
Joseph A. Murphy	8020	District D
Miguel A. Novo, Jr.	8021	District E
Kenneth R. O'Brien	8022	District D
Carmel E. Precia	8023	District B
William J. Robertson	1223	District A
Rafael E. Ruiz	8024	District B
Isaac Sneed	8025	District D
Richard P. Sullivan	8026	District E
Robert L. Tabb III	8027	District C
Ronald A. Tench, Jr.	8028	District D
Preston R. Thompson	8030	District B
John E. Tracey	1272	District A
David P. White	8031	District E
Malcolm B. Williams	8032	District D
Robert L. Woumn, Jr.	8034	District B
Timothy J. Wyse	8035	Persn. Div., Med. Incap. Sec.

JOSEPH M. JORDAN
Police Commissioner

SUPPLEMENTAL STIPULATION

Plaintiffs and defendants submit the following supplemental stipulation of facts:

1. If the Boston Police Department completes a systematic program of reduction in force of sworn personnel so as to terminate 252 sworn personnel, if such reduction in force is conducted so as to preserve representation of black and Hispanic sworn personnel at 11.7% and if such reduction in force is otherwise conducted in accordance with seniority provisions of Mass. G.L. c. 31, §§ [illegible] and 31 and in accordance with preferences provided for by Mass. G.L. c. 31, § 26, 223 white sworn personnel and 29 black and Hispanic sworn personnel would be terminated.

2. Application of preferences provided for by Mass. G.L. c. 31, § 26 operates to exclude 65 sworn personnel, of whom 60 are white and 5 are black and Hispanic, from a strict reverse seniority roster of 252 sworn personnel.

3. At present only 13 sworn personnel, of whom 12 are white and one black or Hispanic, excluding those with statutory preference, have seniority dates between December 30, 1970 and January 1974.

4. If the reduction in force referred to in paragraphs 1 and 2 hereinabove is carried out, black and Hispanic sworn personnel with a seniority date of as far back as January 16, 1980 would be laid off.

5. If the reduction in force referred to in paragraphs 1 and 2 hereinabove is carried out, 19 white sworn personnel with a seniority date of December 30, 1970 would be laid off.

6. Individuals with a seniority date of December 1970 were hired from civil service eligibility lists established on the basis of civil service entrance examinations which were the subject of the complaint in this action and the prior findings of this court.

Dated: August 3, 1981

Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States,

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Does a federal court, previously having found racial discrimination in employment practices, have the power to modify its prior remedial orders in light of new and unforeseen circumstances in order to bar seniority-based layoffs which would substantially eradicate progress achieved to date by ongoing remedial measures designed to achieve integration of a city's police and fire departments?

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Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

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v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the court of appeals is reported at 679 F.2d 965. The opinion of the district court is reported at 522 F.Supp. 873. Both opinions are reproduced in the appendices to the petitions.

Statutes Involved.

These actions involve the interplay of Massachusetts General Laws c. 31, § 39 and court orders providing remedies for violations of 42 U.S.C. §§ 1981 and 1983 and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.* These statutes are also reproduced in the appendices to the petitions.

Statement of the Case.

Prior Proceedings.

These petitions seek review of two actions which had been consolidated for decision below. The actions have lengthy histories. One case relates to the Boston Police Department, the other to the City's Fire Department.[1]

The Police Case.

The police action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Plaintiffs claimed racial discrimination, in violation of 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police Department as well as other appointing authorities subject to Massachusetts civil service regulations. *Castro* v. *Beecher*, 334 F.Supp. 930, 934 (1971).

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[1] The police case, entitled below *Castro* v. *Beecher*, was previously reported at 334 F.Supp. 930 (D.Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D.Mass. 1973); and 386 F.Supp. 1281 (D.Mass. 1975). The fire case, entitled below *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, was previously reported at 371 F.Supp. 507 (D.Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); and 423 F.Supp. 696 (D.Mass. 1976).

Following trial, the district court found that the Massachusetts civil service police entrance examination discriminated against minorities, including plaintiffs, who did not share "the prevailing white culture." *Id.* at 935-36, 943. On appeal the Court of Appeals for the First Circuit held that the civil service examinations were racially discriminatory. *Castro* v. *Beecher*, 459 F.2d 725, 730-31 (1st Cir. 1972). The court of appeals remanded the case with instructions that the district court enter a remedial order which "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that relief fashioned by the district court "is to be more than token." *Id.* at 737.

On remand the district court exhorted the parties to agree upon a consent decree. The court observed:

> there is a *prima facie* presumption that on a job-related examination which is reasonably set to meet merely the requirements (and not something above the requirements) of a police patrolman's job, the percentage of successful black and Spanish-speaking persons who would choose to be patrolmen and who also would meet the requirements of the job would nearly approximate the percentage of blacks and Spanish-speaking persons in the population of the Commonwealth.

Castro v. *Beecher*, 365 F.Supp. 655, 665 (1973).

Shortly thereafter, the district court approved a comprehensive consent decree, which provided, among other measures, for the establishment of civil service certification priority pools, consisting of black and hispanic applicants, and for the implementation of affirmative recruitment programs aimed at black and hispanic applicants. *Id.* at 660-662.

In 1975 plaintiffs brought another action, pursuant to the All Writs Act, 28 U.S.C. § 1651, in order to clarify and pre-

serve the effect of the district court's decree in light of litigation which had taken place in the Massachusetts courts relating to the appointment of police officers in accordance with statutory preferences. The district court held that statutory preferences were displaced by the prior decree only to the extent that the preferences must be applied within the several priority pools established by the decree. *Castro* v. *Beecher*, 386 F.Supp. 1281, 1285 (1975). The district court requested that the parties agree upon a substitute consent decree and recommended the comprehensive remedy adopted in the meantime in the fire case, *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 371 F.Supp. 507, *aff'd*, 504 F.2d 1017 (1975). *Id.* 386 F.Supp. at 1286.

Thereafter the parties entered into a further consent decree, which was approved by the district court on July 7, 1975. The decree required various measures, including certification of police applicants by methods designed to facilitate the appointment in the cities of Boston and Springfield of one minority police officer for each white police officer and to facilitate the appointment by other appointing authorities on a ratio of one to three. The decree provided that its remedial measures shall apply to any city or town which has a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community."

On July 13, 1976 and on June 1, 1979, the district court entered supplemental decrees. These decrees required various continuing remedial measures. They also discharged from further judicial supervision the police departments of numerous cities and towns which had attained the proportional representation parity target according to current census statistics.

Certification of police applicants following each succeeding civil service examination has been the subject of negotiation between the parties. Consequently, the district court has never

been called upon to approve or disapprove the examinations administered following the original decree. Indeed, but for these negotiated adjustments, operation of the revised examinations would have maintained the racial exclusivity of Boston's Police Department.

In the spring of 1981, when the Boston Police Department embarked upon a program of massive reductions in force, plaintiffs filed a motion to modify prior remedial orders. Prompt funding legislation led to a temporary rescinding of the layoff program, and plaintiffs' motion was continued. After the program was reinstituted several months later, the district court held a hearing on plaintiffs' motion, together with a similar motion in the fire case. On August 7, 1981 the district court issued an opinion and order enjoining the Boston Police Department from reducing, pursuant to a program of reductions in force, the percentage of minority officers below the level obtaining at the commencement of the program.

Appeals by state civil service officials and the police union intervenor followed. The Boston Police Commissioner, however, did not appeal. On May 11, 1982 the court of appeals affirmed.

The Fire Case.

The fire case was commenced in 1972 by the N.A.A.C.P. and unsuccessful black and hispanic applicants for appointment as Boston firefighters. As in the police case, plaintiffs claimed racial discrimination, in violation of 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Fire Department as well as other appointing authorities. In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, and the two actions were consolidated.

Following trial, the district court found that plaintiffs had been victims of racial discrimination. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 371 F.Supp. 507, 514 and 517. The district court then issued a remedial order designed to eliminate the "present effects of past discrimination." *Id.* at 520. The district court ordered a program of affirmative recruitment of minority firefighters, enjoined further use of the civil service firefighters entrance examination, ordered development of a job-related examination and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. The district court ordered that the remedial measures remain in force for any city or town with a minority population greater than one percent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community . . . ." *Id.* at 523.

Appeal followed. Relying substantially on its earlier opinion in the police case, 459 F.2d 725, the court of appeals affirmed. *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974). On the subject of remedy, the court of appeals noted that in the police case it had required the district court to institute remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Id.* at 1026. The court of appeals found the remedial measures went "no further than to eliminate the lingering effects" of discrimination. *Id.* at 1027. This Court denied a petition for certiorari. 421 U.S. 910.

Subsequent to the 1974 decree, the district court entered several further consent decrees and stipulations to effectuate its original order. These orders set procedures for administration of new exams, establishment of eligibility lists, affirmative recruitment, appointments and notice and reporting. As in the police case, ongoing judicially approved negotiation of certification measures has obviated any need for judicial ap-

proval or disapproval of the examinations administered following the original decree.

In the spring of 1981, upon commencement of the City's reduction in force program, plaintiffs filed a motion to modify prior remedial orders. As in the police case, proceedings were continued; a consolidated hearing was held on July 30, 1981; the district court's opinion and order issued on August 7, 1981; and appeals followed. As in the police case, the Boston Fire Commissioner did not appeal. On May 11, 1982 the court of appeals affirmed.

Statement of Facts.

At the time these actions were originally brought, racial discrimination had led to virtual exclusion of blacks and hispanics from Boston's Police and Fire Departments. In 1970, only 65 of 2,805 police officers were black or hispanic, representing but 2.3 percent of the total. In the same period 18 of 1,983 firefighters were black or hispanic, representing a mere 0.9 percent of the total. On the other hand, the minority population of Boston was more than 16 percent in 1970 and approximately 23 percent by 1974.

Between 1974 and 1980 the district court's remedial orders in both cases produced substantial progress toward elimination of the effects of past discrimination. During that period, the Boston Police Department hired 492 officers, of whom 213 (representing 43 percent) were black or hispanic. In consequence, on July 6, 1981, 224 of a total 1,912 officers were black or hispanic, and minority representation had risen to 11.7 percent. During the same period, the Boston Fire Department hired 553 sworn personnel, of whom 248 (representing 45 percent) were black or hispanic. In consequence, on

July 7, 1981, 248 of a total 1,690 firefighters were black or hispanic, and minority representation in that department had risen to 14.7 percent.

By 1980, however, the black and hispanic population of the city had risen to between 29 and 30 percent.

In early July 1981, at the outset of the City's 1982 fiscal year, the Boston Police and Fire Departments commenced a systematic program of reductions in force of sworn personnel. The program was initiated for asserted reasons of fiscal necessity. At the time, the mayor, the city council and elected state officials were involved in dispute and had suspended negotiations regarding the City's fiscal affairs. The City's program was to be accomplished by six weekly waves of layoffs, running from early July to mid-August.

The Police and Fire Departments intended to implement these layoffs in accordance with the Massachusetts civil service statute, Mass. Gen. Laws c. 31, § 39, which requires separations from service in reverse order of seniority. The layoff program consequently threatened to produce a devastating reduction in the number of black and hispanic officers on both forces. The Police Department set out to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority. More strikingly, 54.5 percent of the Department's entire complement of minority sworn officers was to be dismissed. The Fire Department set out to lay off 207 officers, of whom 113 were black or hispanic. Of the firefighters to be terminated, 54.6 percent were minority officers, and the layoff program was to eliminate 45.6 percent of all minority members of the force.

If the program had been implemented, minority representation in both the Police and Fire Departments would have plunged profoundly in six weeks. By mid-August only 103 of 1,660 police officers would have been black or hispanic, and minority representation in the department would have fallen

from 11.7 percent to 6.2 percent. By mid-August only 135 of 1,483 firefighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent. In six weeks approximately half of the officers in each Department hired pursuant to the district court's prior decrees would have been fired.

Moreover, although as of July 30, 1981 City officials intended to proceed with only six waves of layoffs, there was no certainty that additional programmatic terminations would not occur, further eroding minority representation.

The District Court's Decision.

In its August 7, 1981 opinion, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2½ amount to 'new and unforeseen conditions' . . . ." *Castro* v. *Beecher*, 522 F.Supp. 873, 877 (1981). The district court noted that, in light of the remedial objective of the prior decrees, "if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation in both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations." *Id.* at 877. The district court also concluded that denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and firefighters and would produce a "grievous wrong." *Id.* at 877. Accordingly, the district court enjoined the Boston Police Commissioner and Fire Commissioner from reducing, pursuant to any departmental or City program of reductions in force, the percentage of minority officers obtaining at the commencement of the program. *Id.* at 877.

The Court of Appeals' Opinion.

In affirming the district court, the court of appeals first concluded that the district court had the power to modify its prior remedial orders. The court of appeals observed that the cases involve "shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees" — namely, "gross discriminatory underrepresentation" of minorities in the Police and Fire Departments. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d 965, 972 (1982). (Emphasis in original.) In light of the City's reduction in force program, "there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Id.* at 972.

Second, the court of appeals found, in the decisions of this Court addressing challenges to the lawfulness of bona fide seniority systems, nothing that "precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system." *Id.* at 974. The court of appeals found that no decision of this Court applies to the "basic issue" here — namely, "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* at 974-75. The court concluded that "[t]o hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted." *Id.* at 975.

Finally, the court of appeals found that maintenance of the present percentage representation of minorities in the Police and Fire Departments "without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination", *id.* at 975, did not entail unconstitutional reverse discrimination. The court of appeals noted

that remedial relief from the effects of past discrimination may require use of "minority-conscious percentage goals and quotas" and observed that the original relief was "not for individuals, but to correct a condition of racial imbalance." *Id.* at 976. The court of appeals identified the issue as "whether the progress made to date in integrating the departments will be preserved." *Id.* at 977. The district court's order to accomplish this result did not "unnecessarily trammel" the interests of white officers, served the public interest and was reasonable. *Id.* at 977-78.

Reasons for Denying the Writ.

These petitions challenge the power of a federal court to prevent the substantial eradication of relief achieved by ongoing judicial remedy in cases involving discriminatory exclusion of racial minorities from the Police and Fire Departments of the City of Boston. The petitions urge the Court to find decisional conflicts where there are none in order to adopt rules of law strictly limiting the discretionary scope of judicial remedies, prohibiting remedies addressed to conditions caused by discrimination and precluding judicial protection of the fruits of its own remedial measures.

A. THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH TRADITIONAL PRINCIPLES GOVERNING THE EXERCISE OF DISCRETION TO MODIFY PRIOR REMEDIAL DECREES IN LIGHT OF NEW AND CHANGED CIRCUMSTANCES.

The district court had inherent power to modify equitable relief to adapt to new or changed circumstances. *United States*

v. *United Shoe Corp.*, 391 U.S. 244, 251 (1968); *System Federation* v. *Wright*, 364 U.S. 642, 647-48 (1961). "A continuing decree of injunction directed at events to come is subject always to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). Equitable relief is a matter within the sound discretion of the district court, and subsequent modification of such relief requires perforce wide discretion. *System Federation* v. *Wright*, *supra*, 364 U.S. at 647-48.

These are cases, moreover, of racial discrimination. Discrimination having been found, the remedial power of the district court is broad: "[W]here racial discrimination is concerned, the '[district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The district court's prior remedial orders sought, of course, to eliminate the effects of past discrimination. They were framed to accomplish, through various measures, the integration of Boston's Police and Fire Departments.

Against this background, the City's program of massive layoffs posed an unforeseen threat to the ongoing remedy. The district court found that failure to modify the prior remedial orders would allow the "substantial eradication of all progress" made in integration of the Police and Fire Departments since the commencement of the litigation. *Castro* v. *Beecher*, 522 F.Supp. at 877. The court of appeals agreed: "Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d at 972.

In these circumstances, the district court's recent order was proper, for an equitable remedy may be modified, in light of

new circumstances, in order to achieve its own purpose. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *United States* v. *United Shoe Corp.*, *supra*, 391 U.S. at 249, 251-52. Modification is warranted when "time and experience" demonstrate that the original decree has "failed to accomplish" its intended result. *United States* v. *United Shoe Corp.*, *supra*, 391 U.S. at 249; see *System Federation* v. *Wright*, *supra*, 364 U.S. at 647.

Likewise, modification of the district court's prior decrees was appropriate in order to prevent the substantial undoing of such remedy as had already been achieved. *Brown* v. *Neeb*, 644 F.2d 551, 560 (6th Cir. 1981); *Perrotte* v. *Percy*, 489 F.Supp. 212, 214 (E.D.Wisc. 1980); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370, 372 (E.D.Pa. 1976), *aff'd*, 578 F.2d 912 (3rd Cir. 1978); see *Exxon Corp.* v. *Texas Motor Exchange of Houston*, 628 F.2d 500, 503 (5th Cir. 1980).

The lower courts' decisions, moreover, reflect the sensitive weighing of practicalities and balancing of public and private interests which are the hallmarks of equity. As this Court has often noted: "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973). (Footnotes and citation omitted.)

First of all, the district court confined its order to a narrow compass. The order prohibited only the reduction of current minority representation. It did not prohibit layoffs of sworn personnel altogether. It neither banned the layoff of all minority officers, nor ordered an increase in minority representation. The order did not require any measures of affirmative action or mandate that white officers be replaced by new minority hirees. The decree set no permanent employment

quota and ordered no permanent maintenance of specified minority representation. It only barred a reduction in minority representation which would be occasioned by the City's proposed response to a particular asserted exigency.

Additionally, the district court's order did not overbear "the interests of state and local authorities in managing their own affairs . . . ." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977). It neither prohibited reductions in force nor prescribed staffing levels. It dictated no internal personnel matters such as assignment, ranking and the like. It left the ongoing political process to the politicians and took no steps which would compel solutions or limit options.[3] It mandated no expenditure of public funds. Notably, indeed, neither the Police Commissioner nor the Fire Commissioner opposed plaintiffs' motions; nor did they appeal. *Cf. Hutto* v. *Finney*, 437 U.S. 678, 688 (1978).

Indeed, as the court of appeals concluded, the district court's order served the pressing public interest of maintaining integrated public safety departments in a major city with a large minority population. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d at 977-78. *Accord, Bridgeport Guard., Inc.* v. *Members of the Bridgeport C. S. Comm'n*, 482 F.2d 1333, 1341 (2nd. Cir. 1973); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

The district court has had years of experience with the problems presented by these cases. As in the past, it remained sensi-

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[3]In fact, immediately following the district court's decision, state and municipal officials renewed political negotiations looking to resolve the City's asserted fiscal crisis. *The Boston Globe*, August 10, 1981, p. 1, col. 3. Subsequently, legislation was passed reflecting political compromises among various public officials, alleviating budgetary pressures upon the Police and Fire Departments and directing the re-hiring of laid-off officers. See 1982 Mass. Acts, c. 190 (June 8, 1982).

tive to the limitations upon the powers of the federal court. For these reasons its exercise of discretion is entitled to "special deference." *Hutto* v. *Finney, supra*, 437 U.S. at 688.

B. The Decision of the Court of Appeals does Not Conflict with Decisions of Other Courts of Appeals.

In asserting that the decision of the court of appeals conflicts with decisions of other courts of appeals, petitioners urge the Court to find conflict where there is none and to rule on an issue which is not raised by the decision below.

No authority cited by petitioners to show circuit court conflict addressed what was the "basic isssue" below — namely "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority based layoffs." 679 F.2d at 974-75. The power of the court to preserve its prior remedy in the face of sudden, massive and unanticipated layoffs is what was decided below. On this issue the courts of appeals do not conflict; they are, rather, in harmony. *See Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541 and 579 (6th Cir. 1982); *Brown* v. *Neeb, supra*.

Petitioners argue that the decision of the court of appeals conflicts with decisions of other courts of appeals sustaining bona fide seniority systems from attack under Title VII and 42 U.S.C. §§ 1981 and 1983. The conflict, however, is illusory. Three of these cases, *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.* and *Watkins* v. *United Steelworkers of Am., Local No. 2369*,[3] dealt with frontal assaults on the validity of

[3] *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); and *Watkins* v. *United Steelworkers of Am., Local No. 2369*, 516 F.2d 41 (5th Cir. 1975).

seniority systems. The fourth, although arising in a somewhat different context, posed precisely the same question: "does a facially neutral excessing plan, which operates on the concept of 'last hired-first fired,' discriminate against minorities who are disproportionately affected?" *Chance* v. *Bd. of Ed. Etc.*, 534 F.2d 993, 997 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). This was not the issue faced by the court of appeals below; consequently its decision neither resolved that question nor conflicted with the holdings of other courts of appeals on that point.

Respondents did not seek, and did not need to seek, from the courts below a determination of the invalidity of the Massachusetts seniority statute because of any discriminatory impact of its operation. Respondents did not seek to establish a separate violation of Title VII or of 42 U.S.C. §§ 1981 or 1983 by reason of the City's layoff program. Rather, they sought to modify relief based upon an adjudication of liability already rendered on other grounds.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971). *See Milliken* v. *Bradley*, *supra*, 433 U.S. at 282. The civil service statute need not have been challenged directly for the district court to have ordered a remedy affecting seniority. Remedial law, may, after all, place greater restrictions on primary activity than does the substantive law which is violated. *See Swann* v. *Board of Education*, *supra*, 402 U.S. at 17; *United States* v. *United Shoe Corp.*, *supra*. Employee expectations based upon a seniority system are not vested rights. Those expectations may be modified, as by statute or by revision of the collective bargaining agreement. They may be modified "to the end of ameliorating the effects of past racial discrimination . . . ." *Franks* v. *Bowman Transportation Co.*, 424

U.S. 747, 778-79 (1976). Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which figures so importantly in the decisions of other courts of appeals in upholding seniority systems from direct attack, does not bar relief affecting seniority once illegal discrimination is otherwise found to have occurred. *Franks, supra* at 758; *see Teamsters* v. *United States*, 431 U.S. 324, 347 (1977).

C. The Decision of the Court of Appeals does Not Conflict with Decisions of this Court.

In asserting that the decision of the court of appeals conflicts with decisions of this Court, petitioners likewise urge the Court to find conflict where there is none.

The decision below does not conflict with decisions of this Court[4] upholding the validity of facially neutral seniority systems despite their disproportionate impact upon recently hired minority employees. This asserted decisional conflict is illusory. The court of appeals was not asked to find, and did not hold, that the Massachusetts civil service statute was invalid. Its operation, rather, was superseded in order to effect, and to preserve, an ongoing remedy based upon prior adjudication of liability on other grounds. *See supra* p. 10.

The decision of the court of appeals also does not conflict with decisions of this Court relating to remedies for racial discrimination. The use of racial classifications and goals as valid remedies for violation of constitutional rights is well established. *See University of California Regents* v. *Bakke*, 438 U.S. 265, 300-02 (1978) (Powell, J.).

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[4] *Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425 (April 5, 1982); *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364 (April 5, 1982); *Teamsters* v. *United States, supra*.

> At this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effects of past discrimination. . . . To the contrary, affirmative relief is *required* to ensure that the effects of past discrimination are negated.

United States v. *City of Miami, Fla.*, 614 F.2d 1322, 1335-1336 (5th Cir. 1980). (Emphasis in original.) (Footnote and cites omitted.)

A racial preference measure is reasonable, and therefore lawful, when it substantially contributes to remediation of prior discrimination without unnecessarily trammeling the interests of white employees. *Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979). In *Weber* this Court found a voluntary, nonjudicial affirmative action plan permissible where the plan did not require the discharge of white workers and their replacement with new black hirees, did not create an "absolute bar" to the advancement of white employees and was a "temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 208. The district court's orders here satisfy these criteria. The orders did not require the discharge of white officers and their replacement with new minority officers. Indeed, the orders did not mandate the discharge of anyone. Neither did they require the hiring of new minority officers; nor did they compel any proportionate gain in minority representation. The orders did not erect any bar, let alone an absolute bar, to white advancement. All matters of advancement and promotion, as well as retention, reduction in force and reinstatement, were left in the hands of the municipal authorities. The district court's orders were maintenance orders only; they preserved the status quo. The orders also were temporary. They responded

to, and were directed at, a specific program which the City's officials claimed was necessitated by sudden fiscal exigency. The district court did not mandate permanent maintenance of current minority representation, did not prohibit fluctuation in minority representation occasioned by circumstances other than the immediate reduction in force program and did not bar eventual reinstatement of both white and minority officers with restoration of original seniority status.

There is no conflict with decisions of this Court due to the fact that the district court's order prevented the discharge of minority officers who had not, individually, demonstrated that they were victims of discrimination. The issue decided below concerned the power of a federal court to protect the fruits of prior affirmative action remedies which had been based upon adjudications of discriminatory exclusion of racial minorities from public employment. As the court of appeals noted, this case "does not involve an award of constructive seniority. . . ." Consequently, decisions such as *Franks* v. *Bowman Transportation Co., supra* and *Teamsters* v. *United States, supra,* which address the scope of "rightful place" constructive seniority remedies available under Title VII to individual victims of discrimination, are not on point. The district court ordered maintenance of current minority representation in the face of a claimed exigent need to lay off half of the black and hispanic officers hired pursuant to prior remedial measures. The district court did not decree a re-ordering of rankings for all competitive and benefit seniority purposes. Those rankings were left undisturbed for all purposes, save implementation of the massive reduction in force program, and they have apparently been resumed upon reinstatement of all terminated officers following solution of the City's fiscal difficulties. Indeed, in light of the ultimate solution, there remains no lasting benefit accorded to minority officers by the district court's decree and no lasting burden, relating to seniority rank-

ing, imposed upon non-minority officers. See 1982 Mass. Acts, c. 190, § 25.

Exclusion of minorities from the Police and Fire Departments having been established, and racial discrimination having been found, the district court's relief was not limited to measures benefiting only officers demonstrating individual victimization. Race-conscious relief "does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *University of California Regents* v. *Bakke*, *supra*, 438 U.S. at 363 (Brennan, J.). Where there has been discriminatory racial exclusion from employment opportunity, class relief, "without regard to the victim status of every class member," is appropriate. *E.E.O.C.* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 177 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (citations omitted).

Nor does the decision of the court of appeals conflict with *Washington* v. *Davis*, 426 U.S. 229 (1976). Establishing a right to modified relief does not require re-establishing liability. Not having set out to show further liability, plaintiffs need not have proved intentional discrimination and judgment having already entered, they need not have re-established their right to relief. *System Federation* v. *Wright*, *supra*, 364 U.S. at 647. These cases were tried on principles of law then widely accepted, and, as the court of appeals observed, it is by no means clear that the earlier decisions would have been different if decided after *Washington* v. *Davis*. In any event, petitioners' reliance upon *Washington* v. *Davis* amounts to little more than a collateral attack upon earlier judgments and a challenge to all ongoing relief. See *Smith* v. *Missouri Pac. R. Co.*, 615 F.2d 683, 685 (5th Cir. 1980).

Finally, the court of appeals' decision does not conflict with *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). The

Court in *Usery* was concerned only with reconciling broad congressional powers under the commerce clause with the reservation of states' rights under the Tenth Amendment. The decision does not address judicial remedies directed against racial discrimination under color of state law and is uninstructive on the only issue presented in this case — a court's power to fashion modified remedial relief in order to preserve accomplishments which prior orders have achieved.

These cases involved findings of discriminatory exclusion of racial minorities from public employment. Remedial measures designed to relieve the consequences of that exclusion and to accomplish integration have been implemented for several years. The decision of the court of appeals was based squarely on the history of prior proceedings and on the specific circumstances which newly posed a threat to the achievements of prior orders. The decision of the court of appeals rests on the unique character of these cases, and there is no conflict with decisions of this Court addressing other circumstances and other issues.

Conclusion.

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

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MOTION BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO (IAFF) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The Petitioner has consented to the filing of this brief, while Respondent has withheld consent.[1]

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[1] Copies of the relevant letters have been filed with the Clerk of this Court.

INTEREST OF THE IAFF AND THE ISSUES TO BE COVERED IN THE IAFF'S BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of federal, state, and municipal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the U.S. The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF wishes to represent the interests of its members across the country who are facing, or may face, the prospects of layoffs caused by fiscal exigencies such as those which were carried out by the City of Boston, and who are employed pursuant to seniority systems established by state and/or local law. The prospects of reductions-in-force in these jurisdictions are not merely conjectural.

In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal year 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," *Government Employee Relations Report*, GERR No. 949, February 8, 1982, pp. 13-15. The financial situation among local governments indicates a similarly stark outlook. In a survey of 100 cities, 62 have laid off or were expecting to layoff employees in fiscal year 1982. Many of these jurisdictions are covered by civil service laws which contain seniority-based layoff provisions that determine the order in which employees will be furloughed in work force reductions.[2] Like Boston, many cities have

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[2] *See* Pet. for Cert. of Boston Firefighters Union, Local 718, pp. A47-A48.

also entered into consent decrees to settle employment discrimination lawsuits. *Government Employee Relations Report, supra,* at 23-36. There is no indication that the financial problems of state and local governments will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

The attached brief *amicus curiae* is submitted to bring to this Court's attention the conflict between the decisions of the courts below which suspended the operation of a valid civil service statute which provides for layoffs based on seniority, and prior decisions of this Court which have held that bona fide seniority systems are afforded special protection in employment discrimination suits.

CONCLUSION

The IAFF has a major interest in the Petition for a Writ of Certiorari previously filed by Petitioner, Boston Firefighters Union, Local 718, and therefore requests, for the above stated reasons, that this motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN SUPPORT OF THE PETITION FOR THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

In affirming the District Court's modification of a consent decree previously entered into by the City of Boston

and minority employees in settlement of an employment discrimination suit, the Court of Appeals for the First Circuit directed the layoff of employees contrary to the provisions of a bona fide seniority system enacted by the Massachusetts legislature. The decision of the First Circuit failed to apply the principles established by this Court that absent a discriminatory purpose, the routine application of a seniority system is not invalid, even though it may result in certain discriminatory consequences. Further, the lower courts' decisions award superseniority to minority employees even though those employees are not identified victims of racially discriminatory employment practices. Because the decisions of the courts below fail to properly consider these and other principles involving the statutory protection afforded bona fide seniority systems or employment practices, the petition for writ of certiorari should be granted.

ARGUMENT

The Petition Should Be Granted Because The Decision Below Disregards Principles Established By This Court Concerning The Special Protection That Is Afforded Bona Fide Seniority Systems In Employment Discrimination Suits.

In a broad pronouncement, the First Circuit held that a District Court has the equitable power to modify a consent decree in a manner that suspends the operation of a bona fide seniority system established by state law. *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). The City of Boston was faced with an economic crisis resulting from the effects of a tax reduction referendum ("Proposition 2½") recently approved by the voters of Massachusetts. It commenced a program to reduce its fire fighting force via layoffs in accordance with the routine application of the "last-hired, first-furloughed" provisions of existing Massachusetts law. Mass. Gen. Laws, Ch. 31, § 39. This action would have caused

minority employees hired as a result of the remedial measures contained in a prior consent decree temporarily to lose their jobs. The District Court concluded that the application of this statute in effectuating layoffs would reverse the results of the prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in obtaining employment in the fire department, and would produce a "grievous wrong." *Castro v. Beecher*, 522 F.Supp. 873, 877 (D. Mass. 1981). It therefore modified the decree to enjoin the fire department from reducing the percentage of blacks and hispanics below the level that existed immediately prior to the commencement of the reduction-in-force program. For the purpose of implementing its order, the District Court required that separate seniority lists be established for minority and non-minority personnel, and ordered that these lists be used in conducting layoffs so that the percentage of minority fire fighters at no time fell below 14.7 percent. The First Circuit approved this remedial measure. This decision flies in the face of the protection Congress afforded bona fide seniority systems under Section 703(h) of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2(h).

The decisions of this Court have repeatedly emphasized the "overriding importance" of seniority systems. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964); *American Tobacco Co. v. Patterson*, 456 U.S. ——, 71 L. Ed. 2d 748, 760 (1982). The Court has recognized that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) . . . [and that] seniority affects the economic security of the individual employee. . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976).

In enacting the Civil Rights Act of 1964, Congress was fully aware of the importance and extent of seniority systems in collective bargaining agreements and afforded bona fide systems "special treatment under Title VII itself." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). As this Court explained in *International Brotherhood of Teamsters v. United States*, 421 U.S. 324, 352 (1977), "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." These principles remained viable when Congress amended the Civil Rights Act in 1972 to apply to public employers, and they are applicable to *all* bona fide seniority systems, whether such systems are the product of state law or agreements resulting from collective bargaining.

The court below, however, concluded that the prior decisions of this court which held that seniority systems are afforded special protection (i.e, *Franks, Teamsters, American Tobacco Co. v. Patterson*, 456 U.S. ——, 71 L.Ed.2d 748 (1982)) did not preclude the district court from enjoining layoffs conducted in strict accordance with the seniority policy embodied in the statute. The First Circuit artfully avoided these decisions of this Court by characterizing the issue as "the power of a Court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Beecher, supra*, 679 F.2d at 974-975. However, these decisions cannot properly be ignored in these factual circumstances. The holding of the First Circuit both oversimplifies the issue and misinterprets the prior authority of this Court.

When the original consent decree was approved in 1974, the District Court found the City's discriminatory employment practices to be an entrance examination which had a disproportionate impact on minority hiring and which was not job-related, and a word-of-mouth recruitment policy that resulted in unintentional racial discrimination. To remedy this discrimination, the Court ordered the de-

velopment of a job-related examination, active recruitment of minority applicants, and the establishment of priority certification groups for black and hispanic applicants. *Boston Chapter, NAACP v. Beecher*, 371 F.Supp. 507, 520-523 (D. Mass. 1974). At the time the District Court modified the decree to prohibit layoffs in accordance with seniority, it made no determination that the fire department had failed to take the necessary steps to comply with the decree. Nor has such a finding been made on appeal.[1] Thus, the lower courts' injunction against the City's legitimate response to its unanticipated fiscal emergency far exceeds the true remedial purposes of the original consent decree. The alleged wrong to be remedied by the original decree was the fire department's *recruitment* and *hiring* policies, not its seniority system. Nevertheless, it is its seniority system which has been trammelled.

The scope of a district court's remedial powers under Title VII of the Civil Rights Act of 1964 is determined by the purposes of that Act. This Court has noted that "a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 364. Those barriers have been removed through the City's continued compliance with the consent decree, and thus, the primary objective of Title VII has been attained.

Nevertheless, the Court of Appeals' affirmance of the District Court's order approved what is, in effect, a grant of retroactive or superseniority to minority firemen in

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[1] In fact, the Courts of Appeals expressly noted that during the six-year period preceding the commencement of the layoffs, the fire department had been steadily increasing the percentage of minority employees pursuant to the consent decrees previously entered in this case. *Boston Chapter, NAACP v. Beecher*, *supra*, 679 F.2d at 966, 970.

contravention of the procedures contained in the bona fide seniority system. It no longer can be disputed that an award of retroactive seniority to identified victims of discriminatory employment practices is proper. *Franks v. Bowman Transportation Co., supra.* But here there has been no adjudication that the City has committed any violation of Title VII in determining that a reduction in personnel was necessary or in effectuating the reduction by complying with the seniority provisions of the state staute. There are no identified victims of discriminatory practices to be accorded such seniority relief under *Franks;* the Court of Appeals has so acknowledged.[2]

More importantly, it is well-settled at this point that Section 703(h) immunizes bona fide seniority systems from attack. Absent a discriminatory purpose, the operation of a seniority system that has some discriminatory consequences is not unlawful. *Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 82.

The courts below were concerned over the fact that the layoffs, if conducted in accordance with the procedures contained in the seniority system, would fall most heavily on the minority employees. The layoffs would indeed affect minority employees in greater proportions, but this disproportionate impact is due solely to the fact that most minority firemen were only recently hired. Such a disproportionate impact alone is not enough under § 703(h) to invalidate a seniority system. *Pullman Standard v. Swint,* —— U.S. ——, 102 S. Ct. 1781 (1982).

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[2] The Court of Appeals admitted that it did not consider whether those minority fire fighters who were granted relief from being laid off were identified victims of discrimination. "This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination." *Boston Chapter, NAACP v. Beecher, supra,* 679 F.2d at 975.

The Court of Appeals viewed the case as one involving "two competing rights, earned seniority versus racially balanced police and fire departments," 679 F.2d at 977, and held that the seniority system must yield in these circumstances. This statement impliedly attributes a purpose to Title VII that Congress did not intend. The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Teamsters, supra*, 431 U.S. at 348 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). The Congressional intent was to ensure that the same employment *opportunities* be made available to all, and not, as the First Circuit held, to ensure that an employer's work force be racially balanced at all times according to the racial make-up of the local population. Further, while the advantages of the seniority system may flow disproportionately to non-minority fire fighters due to the fact that prior discriminatory practices prevented a significant number of minorities from being hired earlier, it is clear that Congress "considered this very effect of many seniority systems and extended a measure of immunity to them." *Id.* at 350. The Courts below have ignored this balance struck by Congress by suspending the operation of the City's neutral, legitimate seniority system.[3]

The importance of resolving the direct conflict between the decision of the Court of Appeals and prior decisions

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[3] The fact that Plaintiffs brought suit pursuant to 42 U.S.C. § 1981 as well as Title VII does not serve as an alternative basis upon which to suspend the operation of a bona fide seniority system. Before a remedy may be imposed under the rubric of that statute, it also must be shown that any differential treatment was the result of purposeful discrimination. *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L. Ed. 2d 835 (1982). No such showing was made below. *Boston Chapter, NAACP v. Beecher, supra*, 679 F.2d at 969.

of this Court regarding the statutory protection afforded bona fide seniority systems cannot be overstated in these times of fiscal emergencies and resultant economic layoffs. The effects on all employees working under statutes and agreements creating seniority systems is obvious.

CONCLUSION

For the foregoing reasons, the Amicus requests that a writ of certiorari be granted to review the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief on the Merits for Petitioner, Boston Firefighters Union, Local 718.

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Question Presented.

Can a federal court in an employment discrimination case grant increased competitive job security to junior minority firefighters who were not victims of the acts of past discrimination, by suppressing a *bona fide* statute requiring layoffs by seniority to the detriment of senior non-minority firefighters then terminated out of seniority?

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Constitutional and Statutory Provisions Involved.

The constitutional provision is as follows: the equal protection component of the Due Process Clause of the Fifth Amendment.

The statutes are as follows: 42 U.S.C. §§ 1981, 1983 and 1988 and §§ 703(a), 703(h), and 706(g) of the Civil Rights Act of 1964, as amended (CRA), 42 U.S.C. §§ 2000 e-2(a), 2000 e-2(h) and 42 U.S.C. § 2000 e-5(g); and Mass. Gen. Laws, c. 31, §§ 33 and 39.

The text of Amendment V and the statutes is set forth in the petition for certiorari at Pet. A. A39 to A47.[1]

Statement of the Case.

A. *Introduction.*

The district court directed the maintainance of specific percentages of black and Spanish-surnamed firefighters after personnel reductions in the Boston Fire Department by ordering that layoffs not be made pursuant to a state civil service seniority statute, Mass. Gen. Laws c. 31, § 39 (Pet. A. A28, A29, A46, A47) where minority persons so insulated from layoff were not victims of the earlier discriminatory acts.

Massachusetts General Laws c. 31, § 39 provides that if permanent employees are "separated" for lack of funds or work, separations are to occur by seniority exclusively and least senior employees are to be separated first. Pet. A. A46, A47. "Seniority" is defined in Mass. Gen. Laws c. 31, § 33 to be, "ranking based on length of service . . . computed from the first date of full-time employment as a permanent employee, . . . in the departmental unit." Pet. A. A43.

The Court of Appeals for the First Circuit affirmed on May 11, 1982, that "[t]he district court had the equitable power to modify the consent decrees, that the Massachusetts statutory

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[1] "Pet. A." identifies references to the opinions of the courts below relating to the disputed August 7, 1981 order and to the relevant constitutional and statutory texts reproduced in the Appendix accompanying Local 718's petition (No. 82-185). The Joint Appendix is cited as "J.A. ."

last hired, first fired seniority system is not insulated from the Court's orders, and that the orders are not unconstitutional." *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965, 978 (1st Cir. 1982); Pet. A. A26. The First Circuit acknowledged that "the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute. . . ." 679 F.2d at 973; Pet. A. A16. In its view, federal court orders could "require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination." *Id.* at 975; Pet. A. A20, A21; and this "is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments." 679 F.2d at 977; Pet. A. A24.

B. *The 1974 Decree.*

Black and Spanish-surnamed applicants for firefighter appointments in Boston and other Massachusetts cities and towns and their associational representative (Boston Chapter, N.A.A.C.P., Inc.) commenced a class action in 1972 asserting that recruitment and certification procedures, and specifically the state developed and administered firefighter examination, discriminated racially in violation of 42 U.S.C. §§ 1981 and 1983. The United States of America initiated a second action asserting similar claims that the City of Boston and its Fire Commissioner and the Massachusetts Civil Service Commission and its Director had violated §§ 1981 and 1983 and also had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The actions were consolidated.

Following trial, the district court found that Boston's combined minority population was twenty-three percent (23%) of Boston's total population and that blacks and Spanish-sur-

named persons constituted less than one percent of its fire department's uniformed personnel. *Boston Chapter, NAACP, Inc., et al.* v. *Beecher*, 371 F. Supp. 507, 514 (D. Mass. 1974). On the basis of the "insignificant" number of minority persons certified and the tests' lack of job-relatedness, the district court concluded that the firefighter entrance examinations administered from 1968 through August, 1971 were racially discriminatory. *Id.* at 507, 510 and 517. It also found that word of mouth recruitment practices of the City of Boston resulted in unintentional racial discrimination. *Id.* at 519-520.

The district court entered a decree on February 8, 1974 that required development and use of a job-related entrance examination; established priority certification groups and certification procedures; directed that its procedures for certification of firefighter job candidates should apply to all Massachusetts cities and towns having at least a one percent (1%) minority population until the complement of minority fire department personnel of such a municipality was commensurate with its minority population; and obligated recruitment of minorities in Boston, 371 F. Supp. at 520-527. The Court of Appeals for the First Circuit affirmed. 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

The priority certification groups established by this February 8, 1974 decree, from which the Massachusetts Civil Service division was to certify firefighter job candidates were as follows:

> "Group A" comprised of all black and Spanish-surnamed applicants who failed the August, 1971 or an earlier discriminatory entrance examination, but had passed the new examination;
> "Group B" comprised of all persons on the division's eligibility lists developed from the August, 1971 examination;

"Group C" comprised of all black and Spanish-surnamed persons who passed a new examination excluding all Group A members; and

"Group D" comprised of all candidates other than members of Groups A, B, and C who passed a new examination.

371 F. Supp. at 522.

Candidates for Boston's *permanent* fire department appointments were to be certified on the basis of one certification from Group A for each certification from Group B until exhaustion of Group A; thereafter one certification was to be made from Group C for each certification from Group B. 371 F. Supp. at 523.[2]

Thus, all black and Spanish-surnamed candidates for Boston Fire Department permanent appointments who failed a discriminatory examination and passed a new examination (Group A) had an absolute priority for certification over black and Spanish-surnamed candidates who never took a discriminatory examination (Group C); and no pairings of certifications between Group B and Group C could or did occur until exhaustion of Group A.[3]

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[2] Prior to the use of a new examination and the start of the certification pairings, a 1975 interim order contracted Group B's population to all persons appointed as *provisional* firefighters by earlier court authorizations. J.A. 16a, ¶ 21. This contracted population's permanent appointments were deferred pending pairings with Group A or C members under the terms of the 1974 decree. 371 F. Supp. at 523. Although such provisional firefighters were on the job in some instances for years earlier, their seniority under Mass. Gen. Laws c. 31, § 33 commences only on their permanent appointment. It was their greater seniority by date of permanent appointment, that was set aside by the August 7, 1981 order.

[3] For all practical purposes, certification was permanent appointment as a firefighter.

C. *Examination and Recruitment Measures After the February 8, 1974 Decree.*

Under a detailed April, 1975 interim consent decree (J.A. 9a-18a), a specified new entrance examination was administered in July, 1975. This interim decree also directed that further examinations should be administered if that new examination did not yield sufficient Group C populations or if a Group C's population became depleted. J.A. 11a, ¶ 6.

Following the July, 1975 examination and before establishment of its eligibility list, the then parties entered an "Agreement To Effectuate Interim Consent Decree" that treated a variety of issues, *e.g.*, post-examination reports, medical and strength/agility examination procedures. This agreement, which was approved by the district court on November 25, 1975 (J.A. 19a-22a) stated in part:

> In the cities of Boston, Brockton, Cambridge, Chelsea, Holyoke, Lawrence, Lynn, New Bedford, Springfield, and Worcester, the Division [of Civil Service of Massachusetts] shall give additional firefighter examinations, during the life of the list from the July, 1975 exam,[4] if it appears, or in fact becomes, impossible to certify applicants to the above-named cities in accordance with the Decree of this Court dated February 8, 1974, and the Interim Consent Decree, dated April 17, 1975, in a manner which will effectuate the said Decrees. In the cities or towns, other than the above named, the Division shall not be required to give additional examinations during the life of the list from the July, 1975, exam even if the A and C Pools become depleted.

J.A. 21a, ¶ 8.

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[4] This eligibility list expired on May 25, 1978. J.A. 33a.

Both Boston Groups A and C had become depleted over a year *prior* to the 1978 expiration of that new (1975) eligibility list.

The parties executed a "Further Agreement to Effectuate Interim Consent Decree", approved by the district court on *April 6, 1977*, "since it [was] apparent that the "C" pools for the Cities of Boston, Cambridge, Holyoke, Lawrence, New Bedford, Worcester and Springfield have become depleted." J.A. 32a. Under this 1977 measure's terms, the state personnel administrator[5] held examinations on June 11 and July 23, 1977 and new eligibility lists were established which would expire two years after their dates of establishment. J.A. 32a, ¶ 4; 34a, ¶ 11.

The Group C populations still could not be maintained. Additional entrance examinations were administered in June 1978, and again in June, 1980. J.A. 35a; 37a, ¶2.

The 1974 decree as well as later implementation decrees put major emphasis on pre-examination recruitment. At no time after the February 8, 1974 decree until 1979 did the private and government plaintiffs criticize any recruitment efforts. In August and October of 1979 the private and federal plaintiffs asserted that the personnel administrator and City of Boston had engaged in inadequate recruitment for the 1978 examination. The claims were resolved by a consent order dated March 12, 1980, providing for the June, 1980 administration of a firefighter entrance examination for Boston and Springfield, Massachusetts, open only to residents of each city and preceded by a recruitment effort satisfactory to plaintiffs. J.A. 37a, 39a. This March order mandated further entrance examinations if the Boston Group C pool was still insufficient. J.A. 40a, ¶5.

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[5]The Massachusetts Civil Service structure changed effective January 1, 1975 and the examination duties of the former division of Civil Service became the responsibility of the state personnel administrator.

Thus, Boston's Group C, black and Spanish-surnamed persons who passed a new examination excluding all Group A members, was constituted after new examinations in July, 1975; July, 1977; June, 1978; and June, 1980, with each examination being preceded by satisfactory recruitment.

D. *Post 1974 Decree Boston Fire Department Hiring.*

Boston Fire Department's permanent firefighter appointments after entry of the February 8, 1974 decree through the 1981 layoffs is as follows:

	Total Hired	Blacks and Spanish Surnamed Hired	Percent Blacks and Spanish Surnamed Hired
1976	79	34	43 percent
1977	198	90	45 percent
1978	179	87	49 percent
1979	52	27	52 percent
1980	45	10	22 percent
(Total)	553	248	45%

J.A. 43a.

Since Boston's initial Group C population established after the July 1975 examination had become depleted prior to April 6, 1977 (J.A. 32a) (and no revived Boston Group C, by court order, was to be in place earlier than November 30, 1977 (J.A. 33a, ¶ 6)) the 124 blacks and Spanish-surnamed firefighters hired in 1976 and 1977 included Boston's complete Group A population and its entire initial Group C population. These 1976 and 1977 hires, by definition, included all persons vic-

timized by failure to pass discriminatory examination and by deficient recruitment (Group A).[6]

Conversely, and significantly, the 124 Boston blacks and Spanish-surnamed firefighters hired in 1978, 1979, and 1980 were Group C first time, new examination candidates who had *never failed* a discriminatory test and who had enjoyed the benefit of sanctioned recruitment efforts.

E. *The 1981 Layoffs.*

Early in July, 1981, Boston initiated a systematic program of terminations from its fire department because of alleged fiscal exigency.[7] Prior to the commencement of the layoff waves, Boston's Fire Department employed 1690 sworn personnel, of whom 248, or 14.7%, were black or Spanish-surnamed persons. J.A. 43a, ¶ 4. At the outset of the litigation in 1972, that percentage was only 0.9%. At the time of entry of the 1974 decree, blacks and Spanish-surnamed persons constituted at least 23% of Boston's population; in July, 1981, the minority population percentage had increased to 30%. 679 F.2d at 970; Pet. A. A35; J.A. 43a, ¶ 5.

Boston initiated its firefighter layoff program by seniority in compliance with Mass. Gen. Laws c. 31, § 39 (J.A. 44a,

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[6] It is possible that Group A could be revived if a black or Spanish-surnamed candidate who failed the August, 1971 or an earlier examination passed a post-1975 test; no such candidate has been identified.

[7] The district court found that the "massive firings" were the result of the state electorate's adoption of "Proposition 2½", Mass. St. 1980, c. 580, (a tax limitation measure with a principal feature restricting annual assessment to 2½% of fair cash value of real and personal property in some municipalities and that its adoption was a "new and unforeseen" development. Pet. A. A37. However, the fiscal difficulty involved here was aggravated by state court ordered property tax abatements owed successful taxpayer plaintiffs against the City of Boston in sums estimated to range between $50 million and $75 million dollars. The city budgeted these payments out of its general budget. Transcript, July 30, 1981, pp. 12, 13 and 15.

¶¶ 7-10; 45a, ¶ 13). Layoffs by seniority occurred on July 8, 15, 22, 29 and August 5, 1981 (prior to entry of the district court's August 7, 1981 order) totalling 173 firefighters, of whom 81 were black or Spanish-surnamed. *Id.* The program proposed a sixth layoff to occur on August 12, 1981, of 34 firefighters, of whom 32 would be black or Spanish-surnamed. J.A. 44a, ¶ 11(a).

If the layoffs observed the statute's seniority rule, 94 non-minority firefighters, 113 black and Spanish-surnamed firefighters, all hired in 1978 through 1980, would have been terminated. The layoffs would have left a 9.1% black and Spanish-surnamed representation in the Boston Fire Department. J.A. 44a; 45a, ¶ 11(a).

The district court's August 7, 1981 order enjoined layoffs by seniority if they resulted in a reduction of minority firefighters below 14.7%. Pet. A. A28, A29. The order's terms permitted termination of only 30 black and Spanish-surnamed firefighters. The data before the Court (J.A. 43a-45a), depicts the following consequences of the August 7, 1981 order:

> (a) if the announced 207 terminations proceeded by seniority the total layoffs would have extended into but not through the 1978 hires;
> (b) since the order allowed layoff of only 30 black and Spanish-surnamed firefighters to preserve the 14.7% population, Boston had to recall and retain all minority firefighters hired in 1978 and 7 hired in 1979 and terminate all 92 non-minority firefighters hired in 1978 and 25 non-minority firefighters hired in 1977; and
> (c) had seniority regulated the separation program, 83 non-minority firefighters who were laid off would have retained their jobs.

Summary of Argument.

I. It is settled that § 703(h) of Title VII immunizes *bona fide* seniority systems and their routine applications. Massachusetts General Laws c. 31, §§ 33 and 39 enact a *bona fide* seniority system requiring that fiscally induced layoffs proceed by "seniority" defined as "rankings based on length of service." The suppression approved by the First Circuit is contrary to that congressional conferral of immunity. Such immunity continued when Congress extended Title VII to certain public employers including the City of Boston and extends to *all bona fide* seniority systems.

Section 1988 of 42 U.S.C., requires that courts in actions pursuant to §§ 1981 and 1983 of 42 U.S.C. apply § 703(h) of Title VII to immunize *bona fide* seniority systems because § 703(h) is federal law that must be applied in exercising jurisdiction pursuant to, and in enforcement of, §§ 1981 and 1983. (Pp. 13-19.)

II. Award of competitive superseniority to insulate less senior minority firefighters from layoff, thus causing the layoff of senior non-minority firefighters, conflicts with applicable decisions of this Court because that award conferred such superseniority upon individuals who were not victims of earlier discriminatory acts. (Pp. 19-23.)

III. The disputed order does not satisfy the tolerances extended to private parties in the design and application of voluntary affirmative action plans and violated the Title VII, §§ 1981 and 1983 rights of terminated senior non-minority firefighters under applicable decisions of this Court. Inasmuch as the range of action for private parties is broader than the scope of action available to governmental entities, if the measure does not satisfy the limitations imposed on private parties, it surely fails as a governmental measure. (Pp. 23-26.)

IV. The disputed order violates the rights of non-minority firefighters to equal protection of laws pursuant to the Due Process Clause of the Fifth Amendment.

It exceeded the limited remedial powers of the federal courts by using a racial and ethnic preference to confer layoff protections upon individuals who were never victims of the identified discrimination to the decisive disadvantage of innocent senior individuals who did not possess the preferred racial and ethnic characteristics and, therefore, is not necessary for a compelling purpose of remedying past discrimination.

The disputed order imposed the entire burden of a remedy for discrimination upon innocent persons who were more senior and identical in every respect save race and ethnicity. This imposition is not tailored to the original wrong and is an invidious racial displacement preference that is improper under equal protection guarantees of the Constitution.

The First Circuit's justification that a racially balanced Boston Fire Department is necessary to provide effective firefighting services must be discredited by this Court because that justification lacks any basis in the record and accepts that public racial perceptions may dictate public agency staffing policies. Any currency to such a theory of justification would seem to delay, if not subvert, achievement of the constitutional goal of making race and ethnicity an irrelevant factor in our national life. Neither "racial equity" nor operational needs is demonstrated here to be a compelling need to justify this use of racial and ethnic exclusionary criteria.

The concern and purpose to insure a 1981 specific racial balance, the First Circuit's "racial equity", requires that the decision of the First Circuit be reversed since there is no substantive constitutional warrant for any racial balances in any population. (Pp. 26-38.)

Argument.

I. The First Circuit's Ruling is Inconsistent with the Immunity Extended by Congress to Bona Fide Seniority Systems.

The issue is well described by the Court of Appeals at 679 F.2d 966 (Pet. A. A2) "[t]his case arises from a conflict between a statutorily established seniority system mandating layoffs on a last hired, first fired basis and court orders insulating a percentage of minorities from such system." In the First Circuit's view, a federal court can prevent neutral, *bona fide* seniority layoffs in order to guarantee maintenance of a specific minority percentage in a work force; otherwise, "[t]o hold a seniority system inviolate . . . would make a mockery of relief already granted." 679 F.2d 975; Pet. A. A19.

The statute suppressed by the order disputed in this case, Mass. Gen. Laws c. 31, § 39, enacts a system of "competitive seniority" whereby fiscally induced layoffs proceed only by "rankings based on length service."[8] Such a seniority layoff mechanism has been a feature of the Massachusetts Civil Service code since 1928. *See, McDonald* v. *City Manager of Fall River*, 273 Mass. 368, 173 N.E. 593 (1930). Section 39 has never been challenged during this decade-long litigation and its *bona fides* is assumed. 679 F.2d 973, 975; Pet. A. A16, A20. Of course, any direct challenge to § 39 faced most formidable difficulties. *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-74 (1979).

The suppression of § 39 approved by the First Circuit is inconsistent with the immunity conferred upon seniority systems

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[8] As to competitive seniority, *see, Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766 (1977): ("one of its major functions is to determine who gets or who keeps an available job.") citing *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964).

by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).[9] The Court of Appeals saw the effects of seniority layoffs by statute as "devastating", 679 F.2d 970; Pet. A. A11: 45.6% of the black and Spanish-surnamed firefighters (113 of 248) would be laid off, thus reducing the Boston Fire Department's minority percentage from 14.7% to 9.1%. Yet such layoffs were by "ranking based on length of service" or "seniority", upon neutral application of the layoff statute (Mass. Gen. Laws c. 31, §§ 33 and 39) to minority and non-minority employees alike. Such layoff results are a permitted routine application of a *bona fide* seniority system. *Teamsters* v. *United States*, 431 U.S. 324, 350 (1977). As pointed out by this Court, "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." *Id.*[10] An injunction against application of Mass. Gen.

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[9] Section 703(h) of Title VII, 42 U.S.C. § 2000(e)-2(h) states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

[10] That legislative history is well-known. *American Tobacco Co.* v. *Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1539-40 (1982); *Teamsters*, *supra*; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759-762 (1976).

Laws c. 31, § 39 could "lie only if the requirement of § 703(h) — that such application be intentionally discriminatory — were satisfied." *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1538 (1982); *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *Teamsters* v. *United States, supra*, at 431 U.S. 352 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559-60 (1977).

Put another way, in enacting Title VII, Congress, being fully aware of the extent and importance of seniority systems, afforded *bona fide* seniority systems very "special treatment". *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1976). Such "special treatment" continued when Congress amended the Civil Rights Act of 1964 to apply Title VII to certain public employers (including the City of Boston) in 1972; "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); and "[s]ection 703(h) on its face immunizes *all bona fide* seniority systems. . . ." *American Tobacco Co., supra*, at 102 S.Ct. 1541 (emphasis in original).

This litigation's §§ 1981 and 1983 auspices cannot support a broader power to negate a *bona fide* seniority system. There is plain congressional instruction that § 703(h) must be heeded in §§ 1981 and 1983 actions: 42 U.S.C. § 1988 states, in part, "jurisdiction . . . conferred on the district courts by the provisions of this Title and of Title 'CIVIL RIGHTS' . . . for the protection of persons in the United States shall be exercised and enforced in conformity with the laws of the United States. . . ." Section 1988 instructs "federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Moor* v. *County of Alameda*, 411 U.S. 693, 703 (1973). Such law includes § 703(h), *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474, 475 (4th Cir. 1978), *cert. denied*, 440

U.S. 979, 99 S.Ct. 1785, 60 L.Ed.2d 239 (1979). Accord, *Chance* v. *Board of Examiners & Bd. of Ed., etc.*, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).[11] See, *Watkins* v. *United Steelworkers of Am. Local No. 2369*, 516 F.2d 41, 44-5 (5th Cir. 1975); *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); and *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.*, 508 F.2d 687 (3d Cir. 1975) *cert. denied*, 425 U.S. 998 (1976).

Apparently, the First Circuit does not disagree with the view that 42 U.S.C. §§ 1981 and 1983 and Title VII involve co-extensive remedial powers in light of its citation of *Setser* v. *Novack Inv. Co.*, 657 F.2d 962, 966-67 (8th Cir. 1981) with approval. 679 F.2d 976. The Eighth Circuit states at 657 F.2d 967, in part:

> We are mindful that "[i]n fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under title VII for direction.[n]

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[11] The Fourth Circuit holds that 42 U.S.C. § 1988, through § 703(h), protects seniority systems in § 1981 actions. 575 F.2d, at 474-75. The Second Circuit rejected the assertion of any different reach of §§ 1981 and 1983, at 534 F.2d 998: "that plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack. Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000(e)(2) (footnote omitted)."

[n] [The original footnote continues in pertinent part:]

. . . . . .

> For the most part, title VII and section 1981 have similar requirements and remedies. *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497, 498 n.1 (5th Cir. 1981); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Section 1981 affords no greater substantive protection that title VII against employment discrimination, *New York*

> This directive is all the more important for determining standards for affirmative action. Divergent standards under the two statutes would render employers unable to remedy some past discriminatory practices, even though the practices were in violation of title VII. Consequently, some effects of employment segregation would be "locked-in." *Id.* at 215, 99 S.Ct. at 2733 (Blackmun, J., concurring). Moreover, by equating the affirmative action standards of title VII with those of section 1981, we obviate the employer's risk of inconsistent obligations.

This view that the remedial powers under 42 U.S.C. § 1981 and Title VII are co-extensive is implied by *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n.24 (1979) ("our treatment of the Title VII claim also disposes of the § 1981 claim without need of a remand. Although the exact applicability of that provision has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII" *Id.*), and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975) ("In particular, Congress noted 'that

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City Transit Auth. v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), and in some respects may afford less. *Compare Guardians Ass'n* v. *Civil Serv.*, 633 F.2d 232, 263-68 (2d Cir. 1980) *with Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), with regard to the question of whether a showing of disproportionate impact is sufficient to make a prima facie case under section 1981. Bona fide seniority systems appear to receive the same substantive protection under both title VII and section 1981, but the question may be open to some doubt. *Compare Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n. 37, 1712 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979, 99 S.Ct. 1785, 60 L.Ed.2d 239 (1979) *with Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 920-21 (3d Cir. 1978).

the remedies avialable to the individual under Title VII are co-extensive with the indiv[i]duals right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.")

The First Circuit cites approvingly *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981) to support its conclusion that seniority can be suppressed. 679 F.2d 972, 978; Pet. A. A15, A25. On May 7, 1982, the Sixth Circuit also decided *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541 (6th Cir. 1982), *cert. applied for* August 4, 1982, No. 82-206, 1982 Term. However, the majority of the five (5) judges on the Sixth Circuit's panels agree with the results here urged by Local 718. *Brown* v. *Neeb*, *supra*, is described misleadingly in West Federal Reporter. Judge Keith's opinion, which the First Circuit quotes, is *not* a majority opinion of that panel. Judge Brown authored a plurality opinion concurring in the result in which Judge Wiseman joined, in *Brown* v. *Neeb*, *supra*, and Judge Brown repudiates Judge Keith's views as follows: "In my view, even though this action was brought pursuant to 42 U.S.C. §§ 1981 and 1983 . . . the district court did not have the authority, when it issued the preliminary injunction, to abrogate the contract and statutory rights of the Union to layoffs by seniority." 644 F.2d at 566. In *Stotts*, *supra*, Judges Keith and Duncan joined a majority opinion holding that seniority could be suppressed and Judge Martin dissented vigorously, agreeing with Judge Brown's reasoning. 679 F.2d at 568. Thus, Judges Brown, Wiseman and Martin are of a view that contract and statutory seniority rights cannot be abrogated, but Judges Keith and Martin opine that abrogation is permissible.

In short, Congress considered the conflict between established *bona fide* seniority systems mandating layoffs on a last hired, first fired basis and affirmative action in its enactment of the Civil Rights Act of 1964. Congress chose to afford "spe-

cial treatment" to such systems, *Trans World Airlines, Inc.* v. *Hardison, supra*, at 432 U.S. 81 and to extend immunity to their routine applications. *Teamsters* v. *United States, supra*, at 421 U.S. 352. These principles remain viable and apply to *all* seniority systems, whether such systems are the product of state law or collective bargaining agreements, in the public and private sectors regulated by Title VII. *Accord, Dothard* v. *Rawlinson, supra*, at 433 U.S. 331-32 n. 14 (1977). Unless Mass. General Laws c. 31, § 39 was adjudicated to be intentionally discriminatory, no injunction against its neutral application was within the power of either the district court or the Court of Appeals. *American Tobacco Co.* v. *Patterson, supra*, at 102 S.Ct. 1538 and *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-4 (1979). The First Circuit may disagree with the balance struck in the conflict between *bona fide* seniority layoff systems and affirmative action but it must abide Congress's choice.

II. Award of Competitive Superseniority to Non-Victims was Improper.

The First Circuit denies that its judgment involves any award of seniority, 679 F.2d at 975; instead, it views the case as one involving "two competing rights, earned seniority and racially balanced police and fire departments." 679 F.2d at 977.

Its disavowal truly blinks at the facts. The district court's 1981 order mandating a 14.7% minority representation in the Fire Department's complement required the use of separate seniority lists for black and Spanish-surnamed employees and for non-minority employees. Layoffs, re-employment and reinstatement had to proceed by strict ratio to maintain that percentage using these racially separate lists. Pet. A. A28, A29.

Thereby junior black and Spanish-surnamed firefighters hired in 1979 obtained greater protection from layoff than their "ranking by length of service" entitled them. The Court of Appeals agrees that this use of separate racially distinctive seniority should supersede the neutral layoff provisions of the civil service statute. 679 F.2d 973; Pet. A. A16.

If the layoffs had proceeded according to the statute's seniority principle, 113 blacks and Spanish-surnamed firefighters would have been laid off. Instead, the district court's order permitted layoffs of only 30 of the 248 black and Spanish firefighters employed on July 1, 1981.

To deny that this case involves an award of seniority is fiction; the order here conferred competitive superseniority by insulating junior blacks and Spanish-surnamed personnel from layoff.

All of the minority firefighters benefitting by this judicial award of constructive superseniority were persons hired in 1979 and 1978 and were Group C candidates. None of its beneficiaries, by definition, were victims or identified as victims of any earlier racially discriminatory practices.

Award of such constructive competitive superseniority to minority class members other than actual, identified victims of a discriminatory act is improper under the clearest and most explicit rulings of this Court.

Award of retroactive competitive seniority to identified victims of discriminatory employment practices to insert victims in their rightful places in a seniority hierarchy is proper and just. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 756, 765, 766, 768 (1976). If class members are not in fact victims of previous hiring discrimination, an award of enhanced competitive seniority is improper. *Id.* at 772-773. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 915, 102 S.Ct. 1127, 1136 (1982) (class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g).)

Teamsters v. *United States*, 431 U.S. 324 (1977) reminds that it is a "delicate task [to adjust] the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing" *after victims* are identified and rightful places determined. *Id.* at 372. As this Court points out, *Id.* at 371-372:

> Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "recreate the conditions and relationships that would have been had there been no" unlawful discrimination. (Citation omitted.)

Here the seniority suppression and senior employee layoffs, with employment retention by non-victims[12] is the identical situation deplored in this Court's comments in *Ford Motor Co.* v. *E.E.O.C.*, ___ U.S. ___, 102 S.Ct. 3057, 3069-70 (1982):

> As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ___, ___, 102 S.Ct. 1534, 1541, 71 L.Ed.2d 748 (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 . . . (1964)), we should be wary of any rule that encourages

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[12] The First Circuit candidly admits that layoff protections are conferred on non-victims but deems the status of the beneficiaries to be irrelevant because of the court's objective to maintain its fixed 14.7% population percentage. 679 F.2d 975, 977; Pet. A. A2, A23.

> job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII, require innocent employees to carry such a heavy burden. (Citation and footnote omitted.)

The order here disputed "compell[ed] innocent workers to sacrifice their seniority" to persons who could not and did not assert any entitlement as individual victims to any enhanced competitive seniority. Innocent senior workers were "relegated to the unemployment lines" solely because of their race.

Thus, the First Circuit spurns the clearest instructions of this Court that only "actual victims" are entitled to to an enhanced position in a seniority hierarchy to displace the seniority position of innocent employees; absent a determination of actual victim status, any enhancement displacing innocent employees is plain error.

The remedial powers of the federal courts may be broad, but they are not "plenary": remedies must be "tailored" to "the nature and extent of the violation." *Hills* v. *Gautreaux*, 425 U.S. 284, 294-95 (1976); and any remedy imposing burdens on other persons must be "necessary to make [the victims]

whole for injuries suffered on account of unlawful employment discrimination." *Regents of University of California* v. *Bakke*, 438 U.S. 265, 301 (1978) (opinion of Powell, J.), quoting *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Under settled principles, an award of superseniority to persons who never sat for, let alone failed, any invalid examination to the decisive disadvantage of innocent competitors in is not "tailoring" a remedy. The First Circuit approach is even more suspect since its theory of the 1974 findings of violation was specifically discredited in *Washington* v. *Davis*, 426 U.S. 229, 245 n.12 (1976) ("to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." *Id.*; one of those cases so identified is *Castro* v. *Beecher*, 459 F.2d 725, 732-733 (1st Cir. 1972), the "police case", and *Boston Chapter, NAACP, Inc.*, 504 F.2d 1017 (1st Cir. 1974) rests on the same theory).

III. The Order Violated the Title VII and Section 1981 Rights of the Terminated Senior Non-Minority Firefighters.

The district court's order involves a government use of race and ethnicity to determine which individuals retain, and which do not retain, public employment. While it presents issues that were implicated in *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105 (1981) and implicit in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), it also presents issues concerning the statutory civil rights of non-minority employees and the extent to which their rights can be impaired, if any impairment is ever acceptable, when an af-

firmative action plan is "judicially required", *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976).

Surely a judicially required plan cannot exceed constitutional limitations;[13] however, the measures contained in the order cannot satisfy even the tolerances extended to private parties in the design and applications of *voluntary*, affirmative action programs.

Under the order's terms, use of separate layoff lists and maintenance of the 14.7% resulted in the discharge of 83 senior firefighters only because they were non-minority persons. *McDonald* v. *Santa Fe Trail Transp. Co.*, *supra*, 427 U.S. at 279, 280 and 286-87 established that non-minority employees are entitled to the full protections extended by § 703(a)(1) of Title VII and 42 U.S.C. § 1981 against racial discrimination in employment. *Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979) addressed the issue of whether a private voluntary affirmative action program employing race conscious features disqualifying a white employee from participation in a training and promotion program was permissible in light of the literal prohibitions of §§ 703(a)(1) and (d). *Weber*, *supra*, holds "that title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208. This Court however cautions that not all *private* race conscious affirmative action programs are permissible: "We need not define in detail the line of demarcation between permissible and impermissible affirmative action plans; . . ." This Court observes that the Kaiser-USWA plan,

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[13] This Court notes in *Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979) that the Kaiser-USWA plan did not involve state action so that case did not present a potential violation of the Equal Protection Clause. More recently, the plurality in *Fullilove* v. *Klutznick*, 448 U.S. 448, 489 (1980) reminds that private action may be tolerable which, if implemented by governmental entities, would be intolerable under constitutional guarantees.

> does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208.

The disputed order clearly trespasses into the impermissible: (a) the August 7 order trammeled the interests of white employees by reorganizing their seniority entitlements; (b) the August 7 order impelled the layoff of white workers and their replacement by junior black firefighters; its implementation required immediate recalls of black and Spanish-surnamed firefighters already terminated according to the seniority principle of Massachusetts Gen. Laws c. 31, § 39 and substituted layoffs of senior non-minority firefighters;[14] and (c) the August 7 order insisted on rigid maintenance of a specific racial balance of 14.7% minority and 85.3% non-minority populations in the Boston Fire Department.

If revision of the interests of white employees, their layoff and replacement by minority workers or the maintenance of racial balance distinguish the impermissible from the permissible, this order, as an affirmative action measure for black and Spanish-surnamed employees of a public employer, vio-

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[14] The First Circuit's asserting at 679 F.2d 977 that the August 7, 1981 order did *not* require the hiring of minorities and the firing of non-minorities is patently incorrect.

lates the rights of non-minority employees pursuant to §§ 703(a)(1) and (2) of Title VII and 42 U.S.C. §§ 1981 and 1983.[15]

Putting the matter in other terms, if the Kaiser-USWA plan was a moderate and reasonable measure by private parties to address the historical absence of minority persons from skilled crafts, the order here, in contrast, is immoderate and arbitrary. Here, in the cause of affirmative action, an order favors one racial and ethnic population by inducing violations of the statutory rights of non-minority firefighters to protection from racial discrimination in their employment.[16] The 83 firefighters laid off here on the basis of their racial characteristics enjoyed the same protections from invidious treatment that their minority colleagues claimed. Their *federal* statutory rights to that protection are violated. If a private affirmative action plan incorporating the same features and effects as does this order would contravene the permissible, this order surely must do so.

IV. The Order Violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

This case presents profound constitutional issues and significant statutory questions. While the Court should proceed on

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[15] It is worth noting that Weber was senior to senior minority employees selected for the Kaiser-USWA plan, 443 U.S. at 199. In effect separate seniority lists were used in the plan's operation. However, "seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights." 443 U.S. at 215 (opinion of Blackmun, J. concurring). Here the specific purpose of the order was "abrogation of pre-existing seniority rights."

[16] Lest any claim be made that no term of the order directed any layoffs, note that on the date of its entry, August 7, 1981, 155 firefighters had been laid off (J.A. 44a), of whom 68 were black or Spanish-surnamed persons.

the statutory grounds to avoid the constitutional issues, *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944), if those statutory points do not resolve the matter, the Constitution, and specifically the equal protection component of the Due Process Clause of the Fifth Amendment, mandates reversal.[17]

First, "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Second, federal courts are subject to the same constitutional limitations inherent in equal protection as are generally applicable to the United States. Third, even in cases involving a denial of constitutional rights, federal court remedial powers are not plenary; an exercise must balance individual and collective interests, and must "tailor 'the scope of the remedy' to fit 'the nature and extent of the violation'". *Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976).

Thus, a federal court must observe the equal protection obligation to refrain from invidious discrimination in framing decrees under its limited remedial powers.

Use of race consciousness may be necessary in addressing remedies for racial discrimination, for, "[i]n order to get beyond racism, we must first take account of race." *Regents of University of California* v. *Bakke*, *supra*, at 438 U.S. 307 (separate opinion of Blackmun, J.) and governmental race-conscious measures have satisfied this Court. However, this Court has never approved any use of a racial classification to divest an individual of his employment; its limited approvals do not extend to, and would not countenance, layoffs of in-

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[17] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976) (*per curiam*).

cumbent employees by race and ethnicity to satisfy a judicial mandate that precise racial and ethnic ratios prevail, as the First Circuit does.

Any use of a racial and ethnic classification is subject to exacting scrutiny; a use is inherently suspect; and a specific use must be "precisely tailored" and "necessary" to achieve "a compelling governmental interest." *Fullilove* v. *Klutznick*, 448 U.S. 448, 507 (opinion of Powell, J., concurring), and 524-26 (opinion of Stewart and Rehnquist, J.J., dissenting); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 290-91, 299, 305 (1978) (opinion of Powell, J.); and *Loving* v. *Virginia*, 388 U.S. 1, 9, 11 (1967). A federal court decree *must* satisfy these same conditions when it employs a racial or ethnic classification. Such an order must, "by a balancing of the individual and collective interests [correct] 'the condition that offends the Constitution'"; it can be entered "'only on the basis of a constitutional violation' and, . . . 'the nature of the violation determines the scope of the remedy.'" (Citation omitted.) *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974).

The decision of the First Circuit must fail because of its inconsistencies with these fundamental principles.

Even at first glance, the order's requirement that a minimum of 14.7% of the fire department's jobs must be allocated to black and Spanish-surnamed persons seems to be a "racially invalid preference" that cannot withstand strict scrutiny.[18]

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[18] The 14.7% establishes an absolute quota on the minimum number of minorities to be employed during the order's life while any additional hiring is still subject to the comensuration features of the 1974 Decree (which are not at issue now). That result parallels the Davis special admissions programs criticized by Justice Powell at 438 U.S. 319-320:

> It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. . ., they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At

The Court of Appeals, does find that the "fact of past discrimination" constitutes a "compelling need" to justify this employment retention quota, 679 F.2d 977; Pet. A. A23. Yet, this disputed measure confers employment advantages on individuals who, by definition, were not victims of the 1972 and earlier exams and recruitment deficiencies. They are 1979 and 1978 minority hires who sat for new examinations administered after satisfactory recruitment programs. *Bakke, supra,* at 307-8 recognizes that "ameliorating, or eliminating where feasible, the disabling effects of *identified* discrimination [may be a compelling need] . . . since the legal rights of the *victims* must be vindicated." (Emphasis supplied.)[19] *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) confirms the imperative that only victims of identified racial discrimination are entitled to proper racially conscious relief. In *Fullilove, supra,* this Court sustained a provision of the Public Works Employment Act of 1977 against a facial challenge, on equal protection grounds, to its requirement that 10% of federal grants be used by grantees to procure services and supplies from minority business enterprises (MBE's). A majority of the justices agree that racial and ethnic preferences can stand only as remedies for victims of identified past discrimination. The plurality opinion of Chief Justice Burger observes that the MBE provision could not satisfy constitutional standards in the absence of an administrative program providing assurance that the stat-

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the same time, the preferred applicants have the opportunity to compete for every seat in the class.

By its terms the order is in effect indefinitely. Pet. A. A28, A29. Its unlimited perpetuation hardly comports with the duration factor noted in *Fullilove* v. *Klutznick, supra,* at 448 U.S. 511 (opinion of Powell, J.).

[19] Note also Justice Powell's comment at 438 U.S. 301, that "the Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in *identified,* race based *injuries* to individuals entitled to the preference." (Emphasis supplied).

ute's racial and ethnic preferences would be available only to MBE's actually impaired in access to public contracting opportunities, 448 U.S. 487, that this administrative mechanism should "prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of past discrimination", 448 U.S. 482, and that misapplications can be limited. 448 U.S. 489. Justice Powell, in his concurring opinion notes that remedies can be imposed to "make persons whole for injuries suffered on account of unlawful . . . discrimination", quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) and finds no constitutional reason to invalidate the MBE provision when "Congress determined that minority contractors were victims of purposeful discrimination." 448 U.S. 497 and 516. Justice Stewart, in his dissenting opinion in which Justice Rehnquist joins, observes "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." 448 U.S. 530-531 n. 12. Justice Stevens makes the same point that preferences must advantage "victims of unfair treatment in the past." 448 U.S. 553.

Other differences between the present case and *Fullilove* reenforce the conclusion that the MBE set-aside approved in *Fullilove* does not support the exclusionary racial and ethnic criteria approved by the First Circuit. *Fullilove*, *supra*, deals not "with the limited powers of a federal court, for example, but with the broad remedial powers of Congress." 448 U.S. 484. *Fullilove* disposes only of a facial challenge to the set-aside provision with no attempt to show "that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party." 448 U.S. 481. In contrast, the present case deals precisely with the "limited remedial" powers of a federal court and this record demon-

strates violations of constitutional and statutory rights of at least 83 firefighters excluded from their employment only because they did not possess favored racial and ethnic characteristics.

Fullilove v. *Klutznick, supra,* and *University of California Regents* v. *Bakke, supra,* confirms that vindication of victims is still essential to justify use of racial and ethnic exclusionary criteria. Under settled precedent, use of such criteria to conserve employment for non-victims at the expense of other innocent employees is not "a precisely tailored" remedy and does not satisfy any "compelling need."

A race-conscious remedy should not be approved without consideration of an additional factor: the effect of the set aside upon innocent third parties. *Fullilove* v. *Klutznick, supra,* at 448 U.S. 514 (opinion of Powell, J., concurring). This Court has never approved any measure designed to improve a disadvantaged group's members access to an opportunity by excluding individuals belonging to another group from the same opportunity, for example, *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1979) did not exclude individuals from the franchise; and *Lau* v. *Nichols,* 414 U.S. 563 (1974) did not result in denials to individuals of a "meaningful opportunity to participate in the educational program". In the Title VII employment discrimination cases "some burdens" are imposed, if, and only if, necessary "as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." *Regents of University of California* v. *Bakke, supra,* 438 U.S. 301-05 (opinion of Powell, J., concurring). This case is not one in which access expectations of innocent individuals are merely diluted. Present interests are divested completely. While innocent individuals may need to "share the burdens" when a "limited and properly tailored remedy" is implemented, *Fulli-*

love v. *Klutznick*, *supra*, at 448 U.S. 484, (opinion of Burger, C.J.), there is no requirement sanctioned by any prior decision of this Court that innocent third parties shoulder the entire burden.

However, the Court of Appeals justifies such an exclusive imposition with this comment, 679 F.2d 977; Pet. A. A24: "We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics . . .." But this case does not involve the rights of one group or another. It involves the loss of 83 jobs by 83 individuals and the mechanism to identify the 83 individuals. The mechanism identifies 83 individuals solely on the basis of race and ethnicity who had no more significant advantage in obtaining this employment that the 83 who were retained. The First Circuit's view of equities in terms of whites as a group and blacks and Spanish-surnamed persons as another group ignores the well-established principle that equal protection rights are individual rights, not group rights. *Regents of University of California* v. *Bakke*, *supra*, at 438 U.S. 289 and 299.

In this case, the First Circuit's focus on "groups" approves the disregard for the personal rights to equal protection of 83 persons on whom it chooses to put the entire burden to remedy a new view of "past discrimination" only because these persons do not possess certain preferred racial and ethnic characteristics. Another 83 individuals are exempted absolutely from the same burdens only because they do possess the preferred racial and ethnic characteristics even though they were never victimized by the past discriminatory acts. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded

the same protection, then it is not equal." *Regents of University of California* v. *Bakke, supra*, 438 U.S. 289-90 (Opinion of Powell, J.).

The displacement of 83 individuals on racial grounds stands in stark contrast to the care taken in the 1974 decree, affirmed by the First Circuit, 504 F.2d 1017 (1st Cir. 1974) and the 1975 modifications to share the burden of a remedy. That former example represents the correct "tailoring" of a remedy for specific discrimination; the present example surely does not.

Ironically, the district court judge who presided over *Boston Chapter, NAACP, Inc.* v. *Beecher, et al*, until spring, 1981, denied a plaintiff's motion to increase the ratio of Group C certifications to the City of Springfield Fire Department on November 16, 1976, stating at J.A. 30a:

> the court is not of the opinion that an amendment to the 1974 decree, which was issued well over two and one-half years ago, is the proper way to remedy any underrepresentations of those two minority groups. Prior to the issuance of the 1974 Decree, this Court gave careful consideration to past discrimination in the selection of firefighters in Massachusetts and possible ways to compensate for it which would at the same time avoid the creation of a procedure that might lead to reverse discrimination. I feel that the preference established in the decree is sufficient to remedy that problem.

Now, six years later, that specter is real.

Still another irony in the earlier stage of this case is reflected in a note following the First Circuit's description of the four groups in the 1974 decree as follows, at 504 F.2d 1017 n.16:

> Nor will the order result in the firing of those who have received provisional appointments pursuant to the current, but now invalid eligibility list. Those temporary appointees will be placed at the top of the Group B list, and their appointments made permanent on a one to one basis with permanent appointments from Groups A and C. None will be fired.

This 1974 concern for the rights of innocent parties is lost in 1981.

The order entered in 1981 is based on no present "compelling need" and its imposition of the total burden on individuals identical in every relevant characteristic, save race and ethnicity, is not "tailored" to the original wrong and infringes on the equal protection rights of the individuals it punishes. It imposes an invidious racial displacement preference utterly hostile to the equal protection guarantees of the Constitution. *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 128 (1981) (opinion of Stewart, J., dissenting): *Fullilove* v. *Klutznick*, 448 U.S. 448, 523-527 (1980) (opinion of Stewart and Rehnquist, J.J., dissenting); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 307 (1978), (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. 312, 341-42 (1974) (Douglas, J.); and authorities there cited. If "the equal protection of the laws is a pledge of the protection of equal laws", *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886), that pledge was repudiated when this order entered.

The First Circuit also justifies the 1981 order as "necessary to preserve the integration already achieved" and necessary "to prevent the departments from regressing to the state of precipitous racial imbalance that prevailed at the commencement of this litigation." 679 F.2d 975, 979; Pet. A. A20, A23. Yet prior to 1981, elaborate, carefully considered, even-handed

orders addressed "identified discrimination", examinations and recruitment techniques of unintentional disproportionate impact and achieved progress in overcoming its effects. Minority representation increased from 0.9% at the start of the litigation to 14.7% on July 6, 1981. 679 F.2d 970; Pet. A. A10. Once having implemented such earlier even-handed remedies, the lower courts had no power in 1981 to insist that specific racial percentages be imposed on the firefighter force now. *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 433, 435-437 (1976).

Of overriding concern to the First Circuit is its perception of 1981 racial and ethnic imbalance. Its focus on "imbalance" is plain from other comments in its opinion: it observes, "the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination." 679 F.2d 975; Pet. A. A20, A21; it casts this case as one of "two competing rights, earned seniority versus racially balanced police and fire departments," 679 F.2d 977; Pet. A. A25; it describes the 1972 litigation as seeking relief "to correct a condition of racial imbalance", 679 F.2d 976, Pet. A. A22; and it rejects earned seniority to conserve "racial equity" 679 F.2d 978, Pet. A. A25. This objective — the redress of an imbalance or "racial equity" — is simply not a proper judicial one. *Pasadena City Bd. of Education* v. *Spangler, supra. Accord, Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971): "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* Since the overriding concern here is to ensure specific racial balances, based on 1981 perceptions, this Court must reverse.

Equally important to the First Circuit is the fact that these preferential orders involve the public safety departments of a large metropolitan city that now has a minority population of at least 30% in which the public interest required a "racially balanced police force". No expert testimony was needed to convince the First Circuit that: "unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility, and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most."; and quoting *Detroit Police Officers' Ass'n.* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, ____ U.S. ____, 101 S.Ct. 3079 (1981), that:

> The argument that police need more minority officers if [*sic*] not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

679 F.2d 977-78; Pet. A. A24, A25.

There is no evidence in this record to support this new justification of the First Circuit and this justification is dubious at best in its application to fire departments. Use of racial and ethnic preferences for these objectives does not relate to "any compelling need" recognized by this Court and its use here should be rejected.

Such an operational needs justification does not involve remedies for victims of identified racial and ethnic discrimination. The premises of "public interest", of "antagonism, hostility and strife", of "poor police and fire protection", of the public's perception of law enforcement officials and institutions", of "effective crime prevention", all important factors in the estimate of the First Circuit, 679 F.2d 977, accept that public perception of racial differences can dictate public hiring and personnel complement policies. The astonishing result is that, instead of overcoming racial and ethnic stereotypes, such stereotypes may be perpetuated by use in the ways endorsed by the First Circuit.

In the absence of a detailed and complete record and adequate findings that operational necessity is a compelling need justifying racially determined staffing patterns in the Boston Fire Department, there is simply no basis for the First Circuit's relying on such a justification as it did.

Justice Powell states in *Fullilove, supra,* at 448 U.S. 516, that "the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be." His observation has application to the quoted justifications of the First Circuit. *Accord, Regents of University of California* v. *Bakke, supra,* at 438 U.S. 361, (opinion of Brennan, White, Marshall, and Blackmun, concurring and dissenting). ". . . even if the concern for individualism is weighed by the political process, that weighing cannot waive the rights of individuals under the Fourteenth Amendment." *Id.*)

Any justification based on "public perceptions" is never self-limiting.

Inevitably its logic may perpetuate racial polarization, racial stereotypes, and racial perceptions if it is accepted. Such

acceptance seems inconsistent with resolute "dedication to the principle that the constitution envisions a nation where race is irrelevant." *Fullilove* v. *Klutznick*, *supra*, at 448 U.S. 516 (opinion of Powell, J., concurring). The real premise of that logic is vulnerable to Justice Stewart's criticism in *Fullilove*, *supra*, at 448 U.S. 532 (opinion of Stewart and Rehnquist, dissenting) as follows:

> Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race — rather than according to merit or ability — and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.[nn]

Footnote [nn] continues:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 227 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (Brandeis, J., dissenting).

Conclusion.

The decision and judgment of the First Circuit should be reversed and judgment entered denying plaintiff's motion to modify prior remedial orders.

Respectfully submitted,

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Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented.

1. Whether the order of the United States Court of Appeals for the First Circuit, affirming the judgment of the district court, constitutes an impermissible and unjustified intrusion upon a valid state statute (Mass. Gen. Laws c. 31, §§ 33 and 39).

2. Whether the order modifying prior remedial orders could be properly entered absent findings of intentional racial or other discrimination.

3. Whether the order accords constitutionally and legally proscribed preferential treatment based solely upon race and ethnicity.

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Nos. 82-185, 82-246, 82-259.

In the

Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioner,
Boston Police Patrolmen's Association, Inc.

Opinions Below.

The consolidated opinion of the Court of Appeals is reported at 679 F.2d 965 (1st Cir. 1982) and appears in the petitions for

writs of certiorari filed by the three petitioners in the instant action. (No. 82-185, Petition of Boston Firefighters Union, Local 718, A1-A26; No. 82-246, Petition of the Boston Police Patrolmen's Association, Inc., 14a-39a; No. 82-259, Petition of Nancy B. Beecher, et al., Appendix A.) The consolidated opinion of the district court is reported at 522 F. Supp. 873 (D. Mass. 1981) and appears in the petitions for writs of certiorari as follows: No. 82-185 at A30-A38; No. 82-246 at 52-13a; No. 82-259, Appendix B.

Prior to the above cited consolidated opinions, the United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts had rendered opinions in several separate cases. These cases are reported at: *Castro* v. *Beecher*, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975); *Boston Chapter NAACP* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); 423 F. Supp. 696 (D. Mass. 1976). The former case is referred to as the "police case" and the latter case as the "fire case" by the Court of Appeals. Prior to their consolidation by the United States District Court on April 6, 1981, the police and fire cases maintained separate identities throughout their histories. (See Joint Appendix: The Fire Cases, 92-51a; The Police Cases, 52a-90a.)

Jurisdiction.

The judgment of the Court of Appeals was entered on May 11, 1982. Petitions for writs of certiorari were filed by *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc., et al.*, No. 82-185; *Boston Police Patrolmen's Association,*

Inc. v. *Pedro Castro, et al.*, No. 82-246; *Nancy B. Beecher, et al.* v. *Boston Chapter, NAACP, Inc., et al.*, No. 82-259, within ninety days of the May 11, 1982 judgment. The petitions in all three cases were granted on November 1, 1982. The cases were also consolidated by this Court on November 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved.

Constitution of the United States, Amendment X.

42 U.S.C. §§ 1981, 1983, 1988.

Sections 703(1), 703(b), 703(j), 706(g), Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(j).

Mass. Gen. Laws c. 31, §§ 33 and 39.

Mass. St. 1980, c. 580.

Mass. St. 1982, c. 190.

Statement of the Case.

Introduction.

This case arises from an order entered by the United States District Court for the District of Massachusetts in these consolidated cases on August 7, 1981, and a judgment of the United States Court of Appeals for the First Circuit affirming that order on May 11, 1982.

Nature of the Case.

Your petitioner, Boston Police Patrolmen's Association, Inc., appealed as intervenor-defendant the order of the district

court which restrained and enjoined the defendant Commissioner of Police for the City of Boston from reducing, pursuant to any city program of reductions in force of police personnel because of lack of funds, the percentage of black and Spanish surnamed post-probationary police officers in the City of Boston Police Department below the level of 11.7 percent of all such officers. As grounds for this action, the district court stated, *inter alia*, that:

> if this Court fails to modify the decree, as requested by plaintiff's motions, then a grevious wrong would be produced by the Court's non-action, i.e., a refusal to amend the remedial order would allow the substantive eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970. *Castro* v. *Beecher*, 522 F. Supp. 873, 877 (D. Mass. 1981).

The essence of the foregoing ruling required the defendant Commissioner of Police to deviate from the specific provisions of a state civil service seniority statute, Mass. Gen. Laws c. 31, § 39, for the express purpose of maintaining the percentage of minority representation in the Boston Police Department that existed on July 6, 1981.

Prior Proceedings.

This litigation was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Their claim was that because of racial discrimination in the recruitment and certification procedures utilized by the City of Boston and the Massachusetts Civil Service Commission, they were effectively denied employment

as police officers. The case was tried before Wyzanski, J., who entered a judgment (*Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971)) after which an appeal was taken to the First Circuit. The Court of Appeals filed an opinion giving directions for further proceedings (*Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972)).

On remand, the district court approved and entered a consent decree. *Castro* v. *Beecher*, 365 F. Supp. 655 (1973). The consent decree in the appendix to Judge Wyzanski's 1973 opinion contained four sub-sections: "Certifications"; "Future Examination"; "Recruitment"; and "Reporting". These subsections set forth specific obligations of the parties designed to correct violations found in previous examination and certification procedures. *Id.* at 661-662.

On July 7, 1975, the district court approved a consent decree (J.A. 52a-63a) which was entered into by the parties as requested by the court. That decree provided for the establishment of priority certification groups for police applications, for an affirmative action recruitment program for black and hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations. The decree also provided that "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certification shall be made according to existing Massachusetts law" (J.A. 63a).

The district court entered a supplemental consent decree on July 13, 1976 (J.A. 64a-74a). Again, on July 1, 1979, the district court approved and entered an agreement which provided for the continuing applicability of the method and ratios for certification provided for by the 1975 decree and for further recruitment activity and monitoring of the Civil Service examination concerning the 1978 police entrance examination (J.A. 75a-77a).

On April 6, 1981, plaintiffs moved to modify prior orders of the district court (J.A. 78a). Specifically, an order was sought preserving the current levels of minority officers in the Boston Police Department. The Boston Police Patrolmen's Association was allowed to intervene as a defendant on April 27, 1981 (J.A. 7a).

A stipulation of facts filed with the court on July 30, 1981 (J.A. 79a-89a) and on August 3, 1981 (J.A. 90a) projected, and the district court found, that the July and August reductions in force contemplated by the City, if carried out according to Mass. Gen. Laws c. 31, § 39, would reduce the percentage of black and hispanic sworn personnel in the Police Department to 6.2 percent (J.A. 81a).

Statement of the Facts.

In 1970, 2.3 percent of the 2,804 sworn officers employed by the Boston Police Department were black or hispanic. At the same time, the black and hispanic population of the city was 16.3 percent. On July 6, 1981, the Boston Police Department employed a total of 1,912 sworn officers of whom 224 (11.7 percent) were black or hispanic (J.A. 79a). During this intervening decade, the district court had found that the minority population of Boston had increased to 30 percent. *Castro* v. *Beecher*, 522 F. Supp. 873, 875 (D. Mass. 1981). On or about July 7, 1981, the Boston Police Department commenced a program of reductions in force of uniformed officers due to a "lack of funds."[1] The program was scheduled for completion on

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[1] At the November, 1980 general election, acting under the initiative process of the Constitution of the Commonwealth of Massachusetts, the voters adopted as Chapter 580 of the Acts of 1980 a tax limitation measure commonly known as Proposition 2½. The principal tax limitation feature of

August 18, 1981. The layoffs were to be accomplished in compliance with the seniority provisions of Mass. Gen. Laws. c. 31, § 39.

Against this background of increased minority representation in the police department, in compliance with the consent decrees, massive police layoffs were scheduled, which, absent court intervention, would significantly diminish this level of minority representation. The district court therefore granted the plaintiffs' injunction relief in the form of plaintiff's requested modification.

Summary of Argument.

This case concerns the extension of judicial power to municipal layoffs whereby a valid Massachusetts seniority statute, both neutral and rational in theory and application, was overridden in contravention of several decisions of this Court and courts of appeals in a majority of the circuits

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Mass. St. 1980, c. 580, restricts most cities' or towns' total annual assessments against their real and personal property to 2½ % of the fair cash value of that property. *See generally, Massachusetts Teachers Association* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 1764, 424 N.E.2d 469. Proposition 2½ had a severe impact on Boston's financial situation.

Subsequent to the court-ordered modification, state legislation significantly improving Boston's financial situation was enacted, Mass. St. 1982, c. 190, enabling the city to rehire the public safety personnel it had previously been forced to terminate. However, the reinstatement of the terminated police officers did not erase the salary losses inflicted by the terminations and the interruption of their employment may defer their eligibility for promotional examinations.

The underlying dispute as to the validity of the district court's preferential layoff system remains and its resolution affects their interests and the interests common to other police officers represented by the Boston Police Patrolmen's Association and it could occur again. There is still substantial interest and injury to warrant relief. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123 (1974).

(pp. 10-15). The Massachusetts seniority statute exemplifies a *bona fide* seniority system held valid by this Court even though its application may have an adverse impact on minorities (pp. 13-14). Absent proof that the Massachusetts seniority statute has an intentional discriminatory purpose, no equal protection violation can be made (pp. 14-15).

Although the instant action arises under 42 U.S.C. § 1981, the preferential layoff system established by the district court cannot be justified under this section (pp. 16-17). Section 1981 confers no greater entitlement than does Title VII of the Civil Rights Act of 1964 (p. 17). If the preferential layoff system established in the instant case is invalid under Title VII decisions of this Court, section 1981 would not afford such a system any greater relief (p. 17).

The Massachusetts seniority statute which provides for a "last-hired first-fired" layoff system may be modified to accommodate victims of past discrimination (pp. 17-19). However, the orders of the district court benefit primarily persons who neither challenged nor were harmed by the past discriminatory examination and certification practices (p. 18).

The Massachusetts seniority statute represents a legitimate exercise of state authority entitled to protection by the Tenth Amendment (pp. 19-20). This Court has held in the past that legislation by states in such areas as police and fire prevention was essential to the independent existence of states and thus was an integral element of state sovereignty (p. 20). Absent a finding as to its unconstitutionality, the court of appeals was in error to override a valid state statute dealing with municipal layoff practices (p. 20).

The court of appeals was in error in finding considerable support in the Sixth Circuit opinion of *Brown* v. *Neeb* to justify the preferential layoff system in the instant case (pp. 21-22). In contrast to the factual situation in *Brown*, in

the instant case, the city had made progress towards the consent degree's goals and was not subject to any timetable for completion (p. 22). Furthermore, no finding of intentional discriminatory hiring practices was found in the case at bar, whereas such was the case in *Brown* (p. 22).

In addition, the preferential layoff system approved by the Court of Appeals is an impermissible form of affirmative action which is contrary to the decision of this court in *United Steelworkers* v. *Weber* (pp. 23-25). The court of appeals neglected to balance the appropriate interests — namely a group interest in affirmative action and the individual interest in seniority (p. 24). In the layoff context, effectuating the group interest abrogates existing seniority rights and creates a readily identifiable class of non-minority victims — contrary to other permissible affirmative action plans (p. 25).

The order of the district court also creates a preferential classification without a determination of a constitutional violation (pp. 26-27). The order of the district court creates a racial preference in the layoff context in favor of individuals for whom there has been no proof that these individuals constitutional rights have been violated (pp. 26-27). To give a preference solely on the basis of color is in contravention of the decision of this court in *Regents of University of California* v. *Bakke* (pp. 26-27).

Argument.

I. The Court of Appeals Incorrectly Abrogated a Valid State Statute Which Created a Bona Fide System of Seniority Thereby Approving a Preferential Layoff System to Benefit a Minority Class of Individuals Who are Not Victims of Discrimination.

A. *The Massachusetts Seniority Statute Establishes a Bona Fide Seniority System for Municipal Police and Fire Employees.*

Title VII of the Civil Rights Act of 1964 ("Title VII")[2] forbids neutral employment practices having an adverse impact on minorities and women; this prohibition, however, does not extend to bona fide seniority systems. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Employers are thus not obliged to modify seniority-based layoff policies.

Employment practices that perpetuate the effects of past discrimination ordinarily violate Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Section 703(h)[3] of Title VII, however, exempts all "*bona fide*" seniority systems from Title VII's prohibitions. In *International Brotherhood of Teamsters*

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[2] 42 U.S.C. § 2000e-17 (1976 & Supp. III, 1979).

[3] Section 703(h) reads in pertinent part:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ..

42 U.S.C. § 2000e-2(h).

v. *United States*, 431 U.S. 324 (1977), this Court held that even though a seniority system may perpetuate the effects of past discrimination, it can be "*bona fide*" within the meaning of section 703(h). Adverse impact alone is insufficient to "outlaw the use of existing seniority lists." *Id.* at 353.

According to *Teamsters*, a seniority system is *bona fide* if: (1) it applies equally to all groups; (2) it is rational and in accordance with industry practice; (3) it did not have its genesis in racial discrimination; and (4) it has been neither negotiated nor maintained for an illegal discriminatory purpose. *Id.* at 355-56; *accord James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). The common "last-hired, first fired" system exemplifies a seniority structure satisfying the *Teamster's* criteria.[4] Title VII thus does not require abrogation of such systems notwithstanding their disproportionate impact on minorities and women.[5]

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[4] It was apparently this very structure that Congress contemplated when it provided § 703(h) protection. *See, e.g.*, 110 *Cong. Rec.* 7217 (1964) (remarks of Senator Clark) ("If under a 'last-hired, first-fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.").

[5] This principle is now accepted outright under Title VII in a majority of the circuits. *See, e.g., Hameed* v. *International Ass'n of Bridge Workers, Local No. 396*, 637 F.2d 506, 516 n.11 (8th Cir. 1980); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977); *cert. denied*, 436 U.S. 946 (1978); *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Jersey Central Power & Light Co.* v. *IBEW Local Unions*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom. EEOC* v. *Jersey Central Power & Light Co.*, 425 U.S. 987 (1976), *on remand*, 542 F.2d 8 (3d Cir. 1976); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The rule has been extended to protect systems from attack under 42 U.S.C. § 1981 (1976), *see, e.g., Pettway*, 576 F.2d at 1191 n.37; *Johnson*, 575 F.2d at 474, and Executive Order 11,246, 3

Mass. Gen. Laws c. 31, § 33, sets out in explicit terms the manner in which a civil service employee's seniority is determined. In pertinent part, § 33 provides:

> Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment . . ..

Section 39 of Chapter 31 provides that:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the

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C.F.R. 339 (1965), *see, e.g., United States* v. *Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *United States* v. *East Texas Motor Freight Systems, Inc.*, 564 F.2d 179 (5th Cir. 1977).

longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

It is respectfully submitted that the foregoing sections of c. 31 of the Massachusetts General Laws constitute a neutral and *bona fide* system of seniority. As such, these sections seem to be clearly constitutional within the framework of the *Teamsters* decision. The seniority system of c. 31, especially as it relates to separation from employment in § 39, similarly clearly does not have its genesis in racial discrimination, nor has there ever been any suggestion to this effect. It applies equally to all racial groups and ethnic groups and to the extent that it "locks" individuals into jobs, it does so for all without reference to skin color or origin. *See, Myers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir.), *rev'd in part* (in light of *Teamsters*), 556 F.2d 758 (5th Cir.), *cert. dismissed sub nom. Local 741, International Brotherhood of Electrical Workers, AFL-CIO* v. *Myers*, 434 U.S. 801 (1977); *Sabala* v. *Western Gillette*, 516 F.2d 1251 (5th Cir. 1975); *vacated and remanded*, 431 U.S. 951 (1977), *remanded to lower court*, 559 F.2d 282 (5th Cir. 1977).

B. *Absent a Finding of Purposeful Discrimination, the Massachusetts Seniority Statute is Not Invalid Because it May Have a Racially Disproportionate Impact.*

In the case at bar, the officers separated from employment were so separated under the application of a so-called "last-hired, first-fired" section of the statute. The separations were

made solely on the status of the officers and not because of their race. While it is true that separation from service according to § 39 of c. 31 would involve a disproportionate impact upon plaintiffs, that fact alone is not sufficient to require the abrogation of a state statute. *Teamsters*, *supra* at 352. *Teamsters* was reaffirmed by this Court in *TWA* v. *Hardison*, 432 U.S. 63, 83 (1977), and § 703(h) protection was extended to non-length-of-service elements of seniority systems in *California Brewers Ass'n.* v. *Bryant*, 444 U.S. 598 (1980) (plurality opinion). Most recently, this Court held that § 703(h) applies to *bona fide* seniority systems adopted after the effective date of Title VII. Thus, plaintiffs attacking any *bona fide* seniority system, under § 703(h), must prove intent to discriminate. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534 (1982). *See also*, *Pullman-Standard Division of Pullman, Inc.* v. *Swint*, 102 S.Ct. 1781, and *Ford Motor Co.* v. *EEOC*, 102 S.Ct. 3057 (1982).

In this case, there has never been any allegation or finding of intentional discrimination. Without exception, every decision rendered in the police case has found that, to the extent discrimination occurred, that discrimination was *unintentional*. *See, e.g.*, *Castro* v. *Beecher*, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971); *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

In *Washington* v. *Davis*, 426 U.S. 229 (1976) this Court held in part that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a discriminatory purpose. More specifically, this Court noted at 245 that:

> Both before and after *Palmer* v. *Thompson*, however, various Courts of Appeal have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice

> standing alone and without regard to discrimination purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; *but with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purposes is unnecessary in making out an equal protection violation we are in disagreement.* (Emphasis added.)

This Court specifically cited *Castro* v. *Beecher* as a case wrongly decided. *Washington* v. *Davis*, 426 U.S. at 244 n.12. Despite this express disapproval, the Court of Appeals justified the scope of the district court's order by reference to the violations found in the original suits. *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974. The court stated that the "independent [constitutional] violations" found in the original suits distinguished the cases from related Title VII decisional law and characterized the "basic issue at stake" in the cases as "the power of a court in a *litigated discrimination case* to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* Reliance on the original erroneous conclusions to supersede a valid seniority statute only compounds the lower court's original mistakes. The district court's power must be circumscribed by the disfavored legal underpinnings of its original decisions. The lower court's reliance on "violations" which rested on discredited legal grounds contravenes the principles of *Washington* v. *Davis* and therefore warrants reversal by this Court.

C. *An Action Brought Under 42 U.S.C. § 1981 Can Not Justify a Preferential Layoff System Which Would be Disallowed Under Title VII Litigation.*

The decisional law discussed to this point was Title VII litigation and this action proceeded under 42 U.S.C. §§ 1981 and 1983. This Court has yet to address the relationships between §§ 703(h) or 703(j) and § 1981 explicitly.[6] This case presents seniority issues within the framework of federal-state relations. Your petitioner respectfully submits that the order of the district court can not be supported by 42 U.S.C. § 1981.

Although the Court of Appeals stated that the "independent [constitutional] violations" found in the original suits distinguished this case from related Title VII cases and characterized the "basic issue at stake" in the cases as "the power of the court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority based layoffs." *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974, no intentional discriminatory purpose in the application of the Massachusetts seniority statute was found as required by *Washington* v. *Davis* to maintain an equal protection action under § 1983. 426 U.S. 229 at 238-245 (1976). Since its inception in 1970, the case at bar has concerned itself exclusively with instances of unintentional discrimination, therefore no violation of § 1981 could occur. *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974; *General Building Contractors Association, Inc.* v. *Pennsylvania*, ____ U.S. ____, 102 S.Ct. 3141 (1982).

It is illogical to imply that § 1981 can justify the preferential layoff system mandated by the Court of Appeals if such a system could not survive a review under Title VII. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979),

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[6] See Discussion, Argument III, on *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) at pp. 23-25, *infra*.

implies that § 1981 confers no greater entitlements than does Title VII and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975) describes the remedies under both statutes as coextensive. This coextension of remedies is required by 42 U.S.C. § 1988 which directs that "jurisdiction [in § 1981 litigation] . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . .." *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-5 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *accord*, *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d at 998 and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d at 1320 n.4; *contra*, *Bolden* v. *Penn State Police*, 578 F.2d 912, 920-21 (3rd Cir. 1978).

D. *The Plaintiffs in the Instant Action are Not Victims of Past Discriminatory Practices to Justify the Preferential Layoff System Approved by the Court of Appeals.*

In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court ruled in favor of constructive seniority for identified victims of racially discriminatory hiring practices. However, this Court indicated that the disputed seniority system, although responsible for locking minorities into lower paid positions, was not the source of discrimination. Therefore, the victims of past discrimination were limited to an award of constructive seniority to the date of their individual employment applications. *Id.* at 757-70. This Court recognized the incompleteness of this remedy, because "most discriminatees even under an award of constructive seniority status will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of discrimina-

tion." *Id.* at 776-77. Nevertheless, this Court was inclined to balance the rights of discriminatees against the legitimate expectations of non-minority workers who had achieved job status under the existing seniority plan. *Id.* at 777.

Thus, under *Franks*, an employer may award retroactive seniority to individual victims of employment discrimination, even though such an award discriminates against non-minority workers. Such relief is justified because it furthers the "central 'make-whole' objective" of Title VII. *Id.* at 778-79.

It is submitted that on the basis of the *Franks* decision, the Massachusetts seniority statute which provided for a "last-hired first-fired" layoff system may be modified to accommodate victims of past discrimination. Notwithstanding the foregoing, the district court's orders have failed to comply with the principles of *Franks*. The district court's orders benefit primarily persons who neither challenged nor were harmed by past acts of discrimination. *See Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 976 and 976 n.14. The district court conducted no hearings to identify which of the police and firemen scheduled for layoff had been victimized by the past discriminatory examination and certification practices. Indeed the fact that the relief protects individuals most recently hired ensures that few, if any, members of the original class will benefit from the remedial orders. *See id.* at 976.

In the absence of proof of discrimination as to each individual minority officer, class-wide relief is improper. Under the circumstances, the lower courts lacked the authority to insulate persons not victimized by discrimination from the effects of the seniority system. The court's power to "preserve relief" was properly limited to insuring that the victims of discrimination retained their rightful place in the seniority system, protected from discharge under the "last-hired, first-

fired" layoff system. *See Franks* v. *Bowman Transportation*, 424 U.S. 747, 762-770 (1975).

In *Franks*, this Court did not adopt a "freedom now" theory of retroactive seniority. This Court did not grant seniority credits to minorities by virtue of race or national origin. Rather, this Court allowed retroactive seniority for victims of discrimination because and to the extent that they were victims. Indeed, this Court has recently acknowledged the "overriding importance" of seniority interests. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534, 1541 (1982) (citing *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). Emphasizing the strength of these expectations, the Second Circuit has refused to extend quota relief to the layoff context. *See Chance* v. *Board of Examiners*, 534 F.2d 993, 998-99 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). The effect on a small number of readily identifiable non-minority workers was too harsh to justify layoff protection based on race alone. *Id.*

In summary, the lower court's orders contravened relevant precedents of this Court and, accordingly, warrants reversal.

E. *The Court of Appeals was in Error to Supersede the Massachusetts State Statute Absent a Finding as to its Un-Constitutionality Since the Statute Represents a Legitimate Exercise of State Authority Protected by the Tenth Amendment.*

The Tenth Amendment to the United States Constitution states, in relevant part: "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to its people." Thus, powers not delegated to the federal government either expressly or as incidental or implied powers are reserved to the states. *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1942). This Court in *National League of Cities* v. *Usery*,

426 U.S. 833 (1976), applied the Tenth Amendment as an affirmative limitation upon federal authority to enact legislation which directly impairs state autonomy in areas of government traditionally reserved to the states. In *Usery* this Court declared that by imposing wage and hour regulations upon states as employers, Congress had interfered with the ability of the states to make decisions affecting essential state functions. *Id.* at 851-52. This Court stated that authority "to structure employer — employee relationships in such areas as fire prevention, police protection was essential to the "independent existence" of states and thus was an integral element of state sovereignty. *Id. Accord, Federal Energy Regulatory Commission* v. *Mississippi*, ____ U.S. ____, 102 S.Ct. 2126, 2143 n.32 (1982).

The seniority principle contained in Mass. Gen. Laws c. 31, § 39, represents a legislative exercise of traditional state authority. Moreover, in the context of this case, application of § 39 represents the identical function — regulation of employment in public safety positions — found by the *Usery* court to be essential to a state's "independent existence."

Under these circumstances, *Usery* counsels that a federal court should not interfere, by "modification" of prior order, with an essential state function absent a finding that the applicable state law is unconstitutional. The decisions of the lower courts in this case, superseding a valid state statute, contravene rights reserved to the Commonwealth of Massachusetts by the Tenth Amendment. Here the provisions of a presumptively valid state statute have been set aside notwithstanding the fact that no direct challenge to the statute was ever mounted. The justification for past action is the remedial authority of the court, *i.e.*, its ability to implement an eleven-year-old decision which this Court has already described as erroneous. Such action necessarily enervates the Tenth Amendment and its underlying doctrines.

II. The Court of Appeals Incorrectly Applied the Sixth Circuit Court of Appeals Decision, *Brown* v. *Neeb* to the Instant Case.

The Court of Appeals cites the Sixth Circuit opinion in *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), as the "only circuit case directly on point" 679 F.2d at 978. Since the Sixth Circuit in *Brown* allowed a modification of a consent decree involving the Toledo Fire Department to effectuate a preferential layoff system for minorities, the Court of Appeals reasoned that similar treatment was justified in the instant case. The Court of Appeals was in error in finding "considerable support" 679 F.2d at 972 in *Brown* to justify the orders of the district court.

The factual situation in *Brown* is clearly distinguishable from the case at bar. In *Brown*, the Sixth Circuit affirmed a lower court decision enjoining the City of Toledo from laying off its firefighters on the basis of seniority. Toledo had entered into a consent decree requiring the implementation of an affirmative action plan with a five-year timetable and percentage goals. Despite the plan, the city had made only marginal progress after seven years. Layoffs threatened further to retard that progress. To ease the problem, the district court enjoined the city from implementing a layoff plan that would have decreased minority representation. 644 F.2d 551 at 554-557. The Court of Appeals agreed, holding that although the consent decree did not mention layoffs, the district court could proscribe layoffs by seniority. *Id.* at 563, 565.

The true majority opinion in *Brown*[7] was concerned by the city's failure to achieve the consent decree's goals.

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[7] Although Judge Keith delivered the court's judgment and an opinion, his opinion is not the majority opinion of the Sixth Circuit and is misleadingly reported as such in West's Federal Reporter, thereby causing the First Circuit to erroneously assume that the majority opinion of the Sixth Circuit held that

In the instant case, the minority representation on the Boston Police and Fire Departments increased significantly since the time of the first consent decree in 1973. Furthermore, no timetable nor any percentage goal was established with respect to the implementation of an affirmative action program. Finally, the city in the instant case could demonstrate economic necessity for the layoffs as the result of "Proposition 2½." See discussion, *infra*, at n.1.

The Sixth Circuit's opinion in *Youngblood* v. *Dalzell*, 568 F.2d 506 (6th Cir. 1978) (per curiam) has a more analagous factual situation to the instant case than *Brown*. In Youngblood, the sixth circuit held that layoffs by seniority may not be enjoined where the City of Cincinnati made progress in satisfying the terms of the consent decree. In addition, a review of the consent decree in *Youngblood* reveals that the city denied any intentional discrimination in its *recruitment*, *testing*, *selection* and *hiring* of fire recruits but rather only conceded that some of its past practices could give rise to an inference of discrimination. 568 F.2d at 507. It is submitted that a review of the consent decrees in the instant case would at best give rise to the same inferences found in *Youngblood*.

In sum, based on the factual record before the Court of Appeals, it was error for the court to grant the relief given in *Brown*. Since significant progress had been made with respect to minority representation in Boston police and Fire departments, and since no record of intentional discrimination existed

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an Ohio seniority statute may be superseded. The majority opinion of the Court (Judge Brown and Judge Wiseman) held that the proposed layoffs would violate an Ohio seniority statute. 644 F.2d at 565-66. For further discussion of this subject, see "*Alternatives to Seniority-Based Layoffs; Reconciling Teamsters, Weber* and *The Goal of Equal Employment Opportunity*, 15 University of Michigan Journal of Law Reform, 523, 535 n.76 (1982).

in the case at bar, the plaintiffs should have been denied relief in accordance with *Youngblood*.

III. The Preferential Layoff System Approved by the Court of Appeals is an Impermissible Form of Affirmative Action and is Contrary to the Decision of This Court in *United Steelworkers of America* v. *Weber*.

The Court of Appeals cites *United Steelworkers of America* v. *Weber*, 443 U.S. 193, *rehearing denied*, 444 U.S. 889 (1980) as support for the preferential layoff system established by the orders of the district court. 679 F.2d at 976. The reliance by the Court of Appeals on *Weber* is error.

In *Weber*, this Court focused on voluntary preferences in the employment context. This Court permitted Kaiser Aluminum to adopt voluntarily a preferential training and promotion program. This Court warned, however, that not every plan would be permissible under Title VII. *Id.* at 208. This Court upheld Kaiser's plan on the ground that Title VII permits some voluntary efforts designed to eliminate traditionally segregated jobs. *Id.* at 208-09.

Group remedial efforts appear to be incompatible with Title VII's focus on the individual.[8] This Court in *Weber*,

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[8] Title VII strictures present an absolute "congressional command that each employee be free from discriminatory practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Title VII proscribes employment discrimination against *individual* members of protected classes. *See, Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978) (involving sex discrimination); *see also Civil Rights Act of 1964*, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) ("It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."). Moreover, Title VII protects white employees as well as nonwhites. *See McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

though, felt that such efforts are permissible if they balance the group interest in affirmative action against the individual nonminority worker's expectations of nondiscriminatory treatment. Such a balancing approach is implicit in this Court's description of Kaiser's plan. 443 U.S. at 207-09. Any group remedial plan must attempt to accommodate both sets of goals to the extent possible. Thus, in seeking remedial responses to racial disparities in their work forces, employers must adopt a balancing approach. *See, International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 at 375.

In pursuing this approach, this Court noted five key elements in Kaiser's program. Kaiser's plan was voluntary and had been collectively bargained. More significantly, this Court found that it did not unnecessarily trammel nonminority interests, bar advancement of non-minorities on account of race, replace non-minorities with minorities on account of race, or maintain percentages of representation. 443 U.S. at 208. Although *Weber* did not explicitly depict any of these factors as determinative of a plan's validity, this Court did find all of them to be present in sustaining Kaiser's plan. It seems likely that while the absence of any single factor is not necessarily fatal to a voluntary plan, the absence of several indicates an impermissible remedial program.

The preferential layoff system mandated by the Court of Appeals in the instant case does not comply with the *Weber* safeguards. It fails to accommodate group and individual interests. There is no group interest in competitive seniority. In the instant case, it is a right established by Massachusetts statute that accrues to individual public safety officers as they join their respective departments. Therefore, the appropriate interests are the group interest in affirmative action and the individual interest in seniority. In the layoff context, effectuating the group interest abrogates existing seniority rights

and creates a readily identifiable class of non-minority victims — contrary to other permissible affirmative action plans.

In *Weber*, the preferential voluntary training program was not designed to defeat existing seniority rights. A preferential layoff plan in contrast would involve abrogating existing seniority rights and is distinguishable from *Weber*, *id.* at 215 (Blackmun, J., concurring).

The preferential layoff system directly replaces non-minority employees with minority workers of lower seniority status on the basis of race. Overt displacement of this nature contrasts sharply with the training program upheld in *Weber* where "no whites were fired, laid off, or demoted to make room for black workers." Edwards, Affirmative Action or Reverse Discrimination: The Head and The Tail of Weber, 13 Creighton L. Rev. 713, 758 (1980).

The preferential layoff system also aims to maintain percentages of minorities during a layoff period, despite *Weber's* prohibition of the same. In *Weber*, this Court reviewed Title VII legislative history which clearly indicated that all preferential treatment is forbidden including the maintaining of existing percentage goals. *Weber*, 443 U.S. at 207 n.7 and 216 Blackmun, J., concurring.

Based on the foregoing, the Court of Appeals reliance on *Weber* is in error and, therefore, warrants reversal by this Court.

IV. The Order of the District Court Creates a Preferential Classification Without a Judicial Determination of a Constitutional Violation.

In *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), this Court said that:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the dictum of equality. All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

In the case at bar, the order rendered by the court below clearly draws a distinction between black police officers and white police officers. It creates a preference for black officers in the area of job rentention and it creates this preference without an initial judicial determination that a constitutional violation has occurred.

In *Bakke, supra*, the Regents of the University of California contended, *inter alia*, that this Court had on several prior occasions approved preferential racial classifications without an initial judicial determination of a constitutional violation. Specifically, the University of California pointed to cases involving school desegregation, employment discrimination and sex discrimination. In response to that argument, this Court asserted that the school cases of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1979) and *Green* v. *County School Board*, 391 U.S. 430 (1968) approved racial classifications which were designed as remedies for the vindication of *constitutional entitlement* (emphasis added). Indeed, the Court noted that in those cases the remedy was not permitted to "exceed the extent of the *violations*" (emphasis added).

With respect to the employment discrimination cases, this Court reached similar conclusions noting that in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) a retro-

designed as remedies for the vindication of *constitutional entitlement* (emphasis added). Indeed, the Court noted that in those cases the remedy was not permitted to "exceed the extent of the *violations*" (emphasis added).

With respect to the employment discrimination cases, this Court reached similar conclusions noting that in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) a retroactive award of seniority to a class of Negro truck drivers was approved because the particular class had been the victims of discrimination. This Court specifically stated that it was necessary to make the victims whole because of the unlawful discrimination practiced against them. *See also*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

In addition, this Court in *Bakke* also observed that courts of appeal have created and approved various types of racial preferences "as remedies for constitutional or statutory violations resulting in identified race-based injuries to individuals held entitled to the preference." *See Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973) and *Carter* v. *Gallagher*, 452 F.2d 314 (8th Cir. 1972).

Having disposed of the arguments offered by the University, this Court added: "But we have never approved preferential classification in the absence of proved constitutional or statutory violations." *Bakke, supra* at 302.

Thus, there seems to be little or no doubt that before a court may create a racial preference, there must first be a judicial determination that the constitutional rights of the person or persons to whose favor the preference is created, have been violated.

In the case at bar, there has been no such determination of a constitutional violation of the rights of the plaintiffs and yet plaintiffs have been given a preference, solely on the basis of color by the court below.

Conclusion.

The extension of federal judicial power in this case to municipal layoffs, whereby a valid Massachusetts seniority statute, both neutral and rational in theory and application, was overridden in contravention of several decisions of this Court wherein significant protection was given to bona fide seniority systems. Petitioner respectfully urges this Court to reverse the court below and to remand this case for appropriate relief consistent with your opinion.

Respectfully submitted,

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NOS. 82-185, 82-246, 82-259

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY B. BEECHER, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONERS

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QUESTION PRESENTED

Whether the district court impermissibly superseded a valid Massachusetts civil service seniority statute in cases dealing with hiring practices by entering remedial orders requiring that percentages of minority members of municipal police and fire departments be maintained despite significant layoffs in those departments.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 965 (1st Cir.

1982) and appears in the appendix to the State's petition for a writ of certiorari at 1.[1/] The opinion of the United States District Court for the District of Massachusetts is reported at 522 F.Supp. 873 (D. Mass. 1981) and appears in the appendix to the State's petition for a writ of certiorari at 64.[2/]

1/ The joint appendix accompanying this brief will be designated by the signal: "(J.A)." The appendix to the state petitioners' petition for a writ of certiorari will be designated "(P.A.)."The First Circuit appendices for the police and firefighter cases will be respectively designated "(1st Cir. P.A.)" and "(1st Cir. F.A.)."

2/ Previous opinions of the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit in these cases are reported at: Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D. Mass. 1973); 386 F.Supp. 1281 (D. Mass. 1975); Boston Chapter, NAACP v. Beecher, 371 F.Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975);

(footnote continued)

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on May 11, 1982. (P.A. 91) The State's petition for a writ of certiorari was filed within ninety days of that date.[3/] This Court granted the State's petition in United States Supreme

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(footnote continued)

423 F.Supp. 696 (D. Mass. 1976). The lower courts and the parties have referred to the cases elliptically as the "police" and "fire" cases.

3/ The state parties are the Massachusetts Personnel Administrator and the members of the Massachusetts Civil Service Commission. The other parties to the consolidated appeals in the United States Court of Appeals for the First Circuit were as follows: Boston Firefighters Union, Local 718, defendant-intervenor in the district court proceeding; and Boston Police Patrolmen's Association, Inc., defendant-intervenor in the same proceedings. The City of Boston, a defendant in that proceeding, took no appeal from the district court decision.

Court No. 82-259 and petitions in Nos. 82-185 and 82-246 on November 1, 1982. 103 S.Ct. 293 (1982). The Court has jurisdiction to review the judgment and opinion of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED[4/]

Constitution of the United States, Amendments X and XIV

42 U.S.C. §2000e-2(h)

Mass. Gen. Laws Ann. ch. 31, §6

Mass. Gen. Laws Ann. ch. 31, §39

Mass. Gen. Laws Ann. ch. 31, §58

Federal Rule of Civil Procedure 60(b)

4/ See the addendum to this brief for the texts of salient provisions other than Mass. Gen. Laws Ann. ch. 31, §39. See also addendum to State's Petition for a Writ of Certiorari.

Massachusetts General Laws Ann.

ch. 31, §39 (West)

If permanent employees in positions having the same title in the departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file

with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower titles or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

STATEMENT OF THE CASE

Introduction

This petition arises from an order entered by the United States District Court for the District of Massachusetts in these recently consolidated[5/] cases

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5/ The police and fire cases maintained separate identities throughout their histories, see pp. 9-21, infra, until they were consolidated for purposes of hearing and decision on plaintiffs' motions to modify prior remedial orders filed April 6, 1981.

on August 7, 1981, and a judgment of the United States Court of Appeals for the First Circuit affirming that order. The district court's order, granting plaintiffs' motion to modify prior remedial orders pursuant to Fed. R. Civ. P. 60(b), directed City of Boston and Massachusetts officials to take certain actions to maintain the percentage of black and Spanish-surnamed post-probationary police and fire officers in the Boston Police and Fire Departments, despite personnel reductions in those departments. (P.A. 64-70) Specifically, the district court ordered that layoffs of officers due to lack of funds not be made pursuant to a state civil service seniority statute, Mass. Gen. Laws. Ann. ch. 31, §39, but rather by a procedure designed to

maintain the percentages of black and Spanish-surnamed officers in the respective forces. (P.A. 64-70)

On May 11, 1982, the United States Court of Appeals for the First Circuit affirmed the district court's order. (P.A. 91) The court ruled that "[t]he district court had the equitable power to modify the consent decrees, that the Massachusetts statutory "last-hired first-fired" seniority system is not insulated from the court's orders, and that the orders are not unconstitutional." 679 F.2d at 978. (P.A. 63) The court rejected the state defendants' contentions that the district court's order impermissibly superseded a valid Massachusetts civil service seniority statute, erred by modifying its prior remedial

orders in the absence of sufficient evidence of changed circumstances, and erred by modifying its prior remedial orders when none of those prior orders addressed reductions in force.

The state defendants filed a petition for a writ of certiorari on August 9, 1981. On November 1, 1982, the Court granted petitions for a writ of certiorari in Supreme Court Nos. 82-185, 82-246, and 82-259.

Prior Judicial Proceedings

The cases before the Court have extended judicial pedigrees.[6/] Plaintiffs commenced the police case in 1970

6/ The opinions of the lower courts included in the appendix to the State's petition and cited supra at n.2 set forth the course of the police and fire litigation and, accordingly, we only summarize the salient points of the cases here.

on behalf of a class of persons composed of "all black and Spanish-surnamed persons who have sought, or might have sought, or may hereafter seek employment as policemen in positions covered by Massachusetts Civil Service laws." Castro v. Beecher, 334 F.Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.). Their original claims, which were based exclusively on the Fourteenth Amendment, were summarized by the district court as follows:

> The claim is that among the practices by which defendants have excluded, limited, and discouraged the employment of black and Spanish-surnamed persons are (a) furnishing on a discriminatory basis information about police employment opportunities, (b) establishing educational requirements not bearing upon any legitimate job qualifications, (c) requiring police applicants to submit to a written examination which has not been validated as

> predictive of successful job performance in the position of policeman and (d) requiring police applicants to submit to other miscellaneous job requirements, such as a height test and a swim test.

Id. After trial, the district court held that "the general intelligence type of police examinations given in 1968, 1969, and 1970 by the Civil Service Commission were not rationally or empirically significantly related to the capacity of applicants to be trained for and to perform a policeman's job." Id. at 924.7/

An appeal followed to the First Circuit. That court affirmed the bulk of the district court's findings, see

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7/ The district court also held, and the First Circuit affirmed, that the recruiting had been "adequately and fairly conducted, and that the educational, height, and swim test requirements all had a significant relation to a policeman's job performance." Castro v. Beecher, 459 F.2d 725, 729 (1st Cir. 1972).

footnote 7, but concluded that the unintentional discrimination represented by the civil service examination was racial in nature. The court suggested that the district court's remedy was based on its "characterization of the 1968-1970 examinations as discriminating broadly against all non-mainstream whites." Castro v. Beecher, 459 F.2d 725, 736 (1st Cir. 1972). The court stated further: "Our contrary view of the discrimination leads us to remedial measures differently affecting both those now on eligible lists and the class (of blacks and Spanish-surnamed persons) represented by plaintiff." Id. Those remedial measures included: a "new examination," "priority pool[ing]" for class members, and "certification" by the Director of Civil Ser-

vice, according to the priority pools, in response to requisitions submitted by police departments. Id. at 737. See Mass. Gen. Laws Ann. ch. 31, §6 (West).[8/]

On remand the parties negotiated and the district court approved and entered an implementing consent decree, Castro v. Beecher, 365 F.Supp. 655 (1973). The consent decree in the appendix to Judge Wyzanski's 1973 opinion contained four sub-sections: "Certifications"; "Future Examinations"; "Recruitment"; and "Reporting." These subsections set forth specific obligations of the parties designed to correct violations found in previous examination and certification

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8/ Although review of the First Circuit decision was not sought in this Court, it was subsequently characterized as "wrongly decided" in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976). See pp. 49-55 infra.

procedures, and to establish priority certification groups for black and Hispanic applicants. Id. at 661-662.

In 1975 plaintiffs brought another action in the district court pursuant to the All Writs Act, 28 U.S.C. §1651, seeking injunctive relief to preserve the effect of certification and appointment procedures established by the 1973 Castro consent decree, in light of certain statutory preferences contained in Massachusetts civil service law. The district court ordered the Civil Service Commission "to certify candidates on the basis of priorities established by the Consent Decree and to give effect to Massachusetts statutory preferences . . . only within each of the groups." Castro v.

Beecher, 386 F.Supp. 1281, 1285 (D. Mass. 1975) (emphasis added).

On July 7, 1975, the district court approved and entered another implementing consent decree "in accordance with" this January 7, 1975, opinion and order. The consent decree (J.A. 52a-63a) provided for "the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and Hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations." 522 F. Supp. at 875. (P.A. 78) The decree also provided that "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the com-

munity, certification shall be made according to existing Massachusetts law." 522 F. Supp. 875. (P.A. 79)

On July 13, 1976, the district court approved and entered a "Supplemental Consent Decree." (J.A. 64a) The preface to this decree read:

> This Court, having approved and entered a Consent Decree in this action on July 7, 1975, to allow a new police officer entrance examination to be given, and said examination having been given in October, 1975, the parties agree to this Supplemental Consent Decree to permit the marking of said examination and the establishment of an eligibility list for the position of police officer in the Commonwealth.

On July 1, 1979, the district court approved and entered an "Agreement As To May, 1978 Examination" signed by all parties to the action. (J.A. 70a) The agreement provided for various administrative and procedural tasks necessary to fulfill the remedial obligations

regarding examination, priority certification, and recruitment established by the prior decrees.

At no time during this lengthy process did the plaintiffs ever mount a challenge to the seniority provisions which underlie the current dispute. Only with their filing of a "motion to modify prior remedial orders" (J.A. 78a) on April 6, 1981, some eleven years after the original complaint was filed and two years after the parties' last agreement concerning the hiring process, did the plaintiffs ask the district court to override the provisions of Mass. Gen. Laws ch. 31, §39.

The Fire Case

Unsuccessful black and Hispanic applicants for appointment as City of Boston fire fighters and the Boston

Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination; this time, however, in violation of 42 U.S.C. §§1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented through appointing procedures.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. §2000e et seq. The two actions were consolidated.

Following hearings, the district court found that blacks represented approximately 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and

that blacks and Hispanics represented only 0.9 percent of the fire department's sworn personnel. Boston Chapter, NAACP, Inc. v. Beecher et al., 371 F.Supp. at 514 (Freedman J.). The court found that plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 196[illegible] through August 1971 were discriminatory. It also found that the word-of-mouth recruitment policy resulted in unintentional racial discrimination. Id. at 510, 515, 519-20.

The district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discrimina-

tory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for black and Hispanic applicants. Id. at 520-23. It also ordered that the remedial measures in its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." Id. at 523.

The First Circuit affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority

hiring and that defendants had not demonstrated job-relatedness. Boston Chapter, NAACP, Inc. v. Beecher et al., 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Since the 1974 decree, the district court entered several interim consent decrees and stipulations. (J.A. 9a; 19a; 32a; 35a; 36a) These subsequent orders set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting. As in the police case, however, plaintiffs never mounted a challenge to the statutory seniority provisions which underlie the current dispute until their "motion to modify prior remedial orders" of April 6, 1981. (J.A. 42a)

Statement of Facts

The relevant facts in this most recent chapter in the police and fire cases draw their full flavor and color from the financial events occurring in the City of Boston in the spring and summer of 1981. Reference to employment patterns in the Boston Police and Fire Departments from 1970 to the present, however, is required to fully outline the factual basis for modification submitted by the plaintiffs and accepted by the district court.

Stipulations signed by the plaintiffs and the city defendants and submitted on July 30, 1981, and August 3, 1981, and the previous findings of the district court, set forth these employment patterns and formed the factual basis of this case. (J.A. 43a; 79a) In 1970, 3.6

percent of the 2804 sworn officers employed by the Boston Police Department were black or Hispanic. Castro v. Beecher, 334 F.Supp. at 943. At the same time, the black and Hispanic population of the city was 16.3 percent. Id. In 1974, prior to entry of the decree in the fire case, 0.9 percent of Boston's firefighters were black or Hispanic. Boston Chapter, NAACP v. Beecher, 371 F.Supp. at 514. At that time, those minorities comprised approximately 23 percent of Boston's population. Id.

Between 1974 and 1980 the percentage of minority police officers and firefighters on the Boston forces increased dramatically. During this period, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were

black or Hispanic. (J.A. 79a) As of July 6, 1981, 224 of 1,912 police officers were black or Hispanic; minority representation had risen to 11.7 percent. (J.A. 79a) During the same period, 45 percent of the firefighters hired were black or Hispanic. (J.A. 43a) By July 6, 1981, minority representation had increased to 14.7 percent in the fire department. (J.A. 43a)

On July 7 and 8, 1981, Boston's police and fire departments commenced programs of reductions in force of police officers and firefighters. (J.A. 43a;80a) The departments "separated" officers from service because of a "fiscal crisis." (J.A. 44a) The layoffs were to be accomplished in compliance with the seniority

provisions of Mass. Gen. Laws Ann. ch. 31, §39 (J.A. 45a; 81a).

The stipulation of facts projected, and the district court found, that the July and August reductions in force contemplated by the City, if carried out according to Mass. Gen Laws c. 31, §39, would temporarily reduce the percentage of black and Hispanic sworn personnel in the Police Department to 6.2 percent. (J.A. 81a) The reductions proposed by the Fire Department would have temporarily dropped minority representation from 14.7 to 9.1 percent. (J.A. 45a) The district court also found that the "minority population of Boston has increased during the intervening decade to 30 percent." 522 F.Supp. at 876. (J.A. 43a; 79a-80a)

Against this backdrop of officer layoffs and concomitant reductions in black and Hispanic representation, the "modification" at issue was ordered.

SUMMARY OF ARGUMENT

I. The district court erred by suspending operation of a valid Massachusetts statute, Mass. Gen. Laws. Ann. ch. 31, §39 (West), never challenged in these cases. Despite the fact that the cases exclusively concerned hiring practices, the court entered remedial orders superseding §39 and requiring that percentages of minority members of municipal police and fire departments be maintained despite significant layoffs in those departments.

Contrary to previous opinions of this Court, the remedy imposed by the district court bore no relation to the scope of

any constitutional violation found in the prior proceedings in these cases. The implementation of remedial devices establishing new examination procedures and priority pooling of minority applicants corresponded to the nature of the original violations. The district court's August 7, 1981, order did not. The district court's order also exceeded the scope of any constitutional violations because it conferred benefits on recently hired minority officers who could not have been the victims of the prior discriminatory practices.

Finally, the district court abused its discretion by suspending operation of a valid state statute because the constitutional basis for its original findings of unintentional discrimination

was subsequently discredited by this Court. Since remedy must correspond to constitutional violation, findings of unintentional violations in a hiring process which rest on discredited legal principles form an insufficient constitutional predicate for suspension of a valid statutory layoff system.

II. Recent decisions of this Court upholding bona fide seniority systems establish that independent, discriminatory employment practices perpetuated by application of a bona fide seniority system form an insufficient basis for invalidation of those systems. Application of §39 to the layoffs at issue should be evaluated in accordance with this precept. Although plaintiffs-respondents did not seek to invalidate

the bona fide seniority system embodied in §39, the district court could not by "suspension" of state law or "modification of prior orders" circumvent the protection afforded such systems because that protection extends not only to entire systems but to particular applications of seniority provisions to events such as reductions in force expressly covered by those systems and vital to their operation.

III. The district court's orders contradict principles of federalism embodied in the Tenth Amendment. The Constitution's explicit grants of federal authority are subject to the Tenth Amendment's affirmative limitation protecting the States qua States. The Court gave new voice to this proposition in National League of Cities v. Usery, 426 U.S. 833

(1976). The principles announced in that decision apply with equal force to orders of a federal court which displace or impede integral governmental functions and thus usurp powers reserved to the States by the Tenth Amendment.

The district court orders violate the Tenth Amendment because they regulate the State as a State, address matters that are indisputable attributes of state sovereignty, and directly impair the State's ability to structure integral operations in areas of traditional governmental functions.

ARGUMENT

I. THE LOWER COURTS ERRED BY SUPERSEDING A VALID MASSACHUSETTS STATUTE NEVER CHALLENGED IN THIS CASE.

Plaintiffs' request to modify the district court's prior remedial orders (J.A. 42a; 78a) grew out of their dissatisfaction with application of Mass. Gen. Laws Ann. ch. 31, §39, to the layoff of police and firemen undertaken by the City of Boston in July of 1981. Pursuant to §39, permanent employees are "separated" from their positions according to seniority. Thus the least senior employees are separated first.[9/]

9/ Section 39 is reproduced supra at 5-6. Its provisions parallel the provisions of other states' statutes applicable to public service layoffs. An exhaustive list of similar statutes appears at A. 47-48 of the Boston Firefighters Union, Local 718's Petition for a Writ of Certiorari.

Section 39 has never been challenged in the long histories of the police and fire cases. Nor was it challenged in plaintiffs' "motion to modify prior remedial orders." Despite its continuing validity, however, both the district court and the court of appeals suspended its operation and ordered that percentages of minority officers be maintained despite layoffs in the respective departments.

Suspension of Mass. Gen. Laws Ann. ch. 31, §39 in this case represented an abuse of the district court's equitable power and an intrusion into the prerogatives of the Massachusetts Legislature. Contrary to previous opinions of this Court, the remedy imposed by the district court bore no relation to the scope of

any constitutional violation found in the prior proceedings in these cases. Furthermore, the legal basis for the original violations, i.e., unintentional discrimination, was discredited by the Court in Washington v. Davis, 426 U.S. 229 (1976) and therefore formed an insufficient predicate for the August 7, 1981, orders. The state petitioners analyze each of these considerations in turn.

A. The Remedy Imposed By The District Court Bore No Relation To The Scope of Any Constitutional Violation.

While the reach of federal equitable power is broad, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), it "is not plenary." Hills v. Gautreaux, 425 U.S. 284, 293 (1976). There are "fundamental limitations" on

"the remedial powers of the federal courts to restructure the operation of state and local governmental entities." Id. A federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Id. at 293-294, quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974) and Swann, 402 U.S. at 16.[10/]

In this case the district court found constitutional violations in certain police and fire entrance examinations administered by state officials between

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10/ Although Milliken addressed questions of impermissible remedies for school desegregation, its holding "was premised on a controlling principle not limited to a school desegregation context." Hills v. Gautreaux, 425 U.S. at 294 n.11.

the years 1968 and 1971.[11] Remedial orders requiring new examination and certification procedures and priority pooling[12] therefore corresponded to the nature of the original violations found. The remedial orders were designed first to establish a racially neutral statewide system of examination and certification for public safety positions, and then to create a mechanism for increasing minority representation in the respective forces. Having previously established those systems, however, the district court's recent order requiring that a certain percentage of minority

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11/ Castro v. Beecher, 334 F. Supp. at 941; Boston Chapter, NAACP v. Beecher, 371 F. Supp. at 510-512.

12/ See pp. 9-21, supra.

officers be maintained, despite layoffs and despite a valid state seniority statute, exceeded the court's authority. Cf. Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 433-435 (1976) (district court exceeded its authority by enforcing desegregation orders so as to require annual readjustment of attendance zones to insure racial balance).

The task of a court of equity confronted with constitutional violations "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Milliken v. Bradley, 418 U.S. at 738. Not all social conditions, however, pose questions of constitutional dimension. This Court has counseled against "equa-

ting racial imbalance with a constitutional violation calling for a remedy." Id. at 741 n.19. There exists no "substantive constitutional right to a particular degree of racial mixing or balancing." Pasadena, 427 U.S. at 433-434; Swann, 402 U.S. at 24.

Notwithstanding these precepts, the district court expressly characterized this case at oral argument as "a percentage matter." (1st Cir. P.A. 75, 84, 85-86) The district court's demographic concern that the percentages of minority officers on the police and fire forces remained less than the percentage of minorities in the City of Boston at the time of the August 7, 1981, orders, however, did not constitutionally justify its action. Indeed, Pasadena v. Spangler expressly dismissed this reasoning:

> It may well be that petitioners have not yet totally achieved [a] unitary system. . . . But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-437 (emphasis original). Thus the Court defined the limit of federal equitable power by reference to the implementation of remedial devices, not by measuring progress in light of demo-

graphic patterns subject to forces unrelated to the source of the original constitutional violations.

Where, as here, previous court orders eliminated racially discriminatory practices in the examination and certification of applicants for public safety positions, and court-ordered priority pooling created preferences for minorities in the hiring process, the fact that minority representation in the forces remained less than minority representation in the population of the City of Boston did not provide the district court with the authority to suspend a valid state statute to preserve minority percentages in the face of layoffs.

The district court orders also exceeded the scope of any constitutional violation because they suspended operation of a statutory seniority system never implicated in the prior judicial findings of impermissible conduct. This Court struck down a similarly intrusive federal judicial remedy in Milliken v. Bradley. There, a lower court's "metropolitan" desegregation remedy was held to be "impermissible" because "it restructured operation of local governmental entities not implicated in any constitutional violation." Hills v. Gautreaux, 425 U.S. at 296. Absent proof of an "interdistrict violation," Milliken held, there existed no "constitutional wrong" calling for an "interdistrict remedy." Id. at 744-745.

Similarly, in the absence of proof of unconstitutional operation of the Massachusetts statutory seniority system, the district court lacked power to suspend the valid state law which established it. Cf. Chance v. Bd. of Ed., 534 F.2d 993, 997 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).13/

The fact that previous judicial findings of unintentional discrimination in examination procedures had been made against state administrators did not

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13/ Contrast Morgan v. O'Bryant, 671 F.2d 23, 26-27, 27 n.5 (1st Cir. 1982), cert. denied, 103 S.Ct. 62 (1982)(absent "proceedings and proof showing that Boston's dual school system had been abolished," and that "desegregation remedial goals" have been "fully achieved," district court retained power to make orders premised on original constitutional violations). In the instant case, however, constitutional violations were limited to the examination procedure. There existed, therefore, no remaining "constitutional wrong" calling for a remedy, as in the Boston school case.

justify extension of judicial remedies to the statutory layoff system.[14/] Although Massachusetts officials supervise both the examination and termination procedures, the unintentionally unconstitutional administration of a discriminatory testing device by state officials did not abrogate the inextinguishable, independent right and power of the Massachusetts Legislature to determine the appropriate termination procedures for public safety officers.[15/] "The

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14/ Cf. Milliken v. Bradley, 418 U.S. at 734-735, n.16; 742-746 (despite constitutional violations by Michigan state officials, interdistrict desegregation order impermissible because it would abrograte rights and powers of suburban school districts under Michigan law).

15/ Cf. Massachusetts Retirement Board v. Murgia, 427 U.S. 307, 314-317 (1976) (regulation of physical condition of public safety officers represents a legitimate purpose of state legislation).

federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)(Milliken II).

Previous school desegregation and employment discrimination cases decided by this Court have required the States "to redress the wrongs worked by specific instances of racial discrimination." University of California Regents v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). Implementation of neutral testing procedures and preferential priority pooling in these cases accordingly redressed specific "wrongs" and vindicated a constitutional entitlement. That entitlement did not, however,

constitute a predicate for the recent remedy ordered by the district court. The district court ignored fundamental, affirmative limitations on the judicial power. The district court ordered, and the court of appeals approved, a remedial decree which transcended all previous judicial determinations in these cases and superseded a valid state seniority statute administered in complete accord with the Constitution. This grant of relief was patently incommensurate with the constitutional violations to be repaired.

The district court's order contradicts the Milliken v. Bradley formula for another, related reason. Since the scope of a federal court's remedial

orders must conform to the scope of the constitutional violation, it follows that a court may only impose burdens designed to remedy the actual effects of a prior legal violation in order to make the identified victims whole. Milliken II, 433 U.S. at 280-281. See Fullilove v. Klutznick, 448 U.S. 448, 525 n.4 (1980) (Stewart, J., dissenting). The "victims" of discrimination may include those personally denied employment or other opportunity, as well as those who, e.g., were deterred from application yet could have been hired but for the discriminatory practices. The district court's recent order, however, afforded relief to all minority officers, whether or not they had been wrongfully denied certification or deterred from application by

use of the discriminatory testing device. The district court conducted no hearings to identify those scheduled for layoff who had been victimized by the past discriminatory examination and certification practices. Indeed, the district court failed to identify even those who, because of their age,[16/] could not have been "victims" of the discrimination which occurred ten to fourteen years ago. The court of appeals acknowledged that "[t]he orders require that there be a certain percentage of minorities . . . without regard to whether the individuals

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16/ Age limitations on applicants for public safety positions, see Mass. Gen. Laws Ann. ch. 31 §58, rendered the possibility highly unlikely that those who benefited from the district court's orders could have been the victims of the earlier discriminatory practices.

comprising the minority percentage were the actual victims of past discrimination." Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. (P.A. 49) In fact, the orders benefited primarily those not harmed by past acts of discrimination, because the relief protected relatively young minority officers most recently hired. Thus, while the opinions of the district court and the court of appeals characterize the order as a remedial measure, "it plainly operates as a quota." Fullilove v. Klutznick, 448 U.S. 448, 541 n.13 (Stevens, J., dissenting). The order was not narrowly tailored to make identified victims whole. Id. at 525 n.4 (Stewart, J., dissenting). Rather, it swept broadly, conferring benefits indiscriminately on victims and non-victims alike.

The court of appeals placed great emphasis on the fact that "underrepresentation" of minorities still existed in the forces, and that layoffs made according to seniority would "eviscerate" relief already ordered. 679 F.2d at 974-975. (P.A. 45) But if these considerations alone can justify the random award of constructive seniority embodied in the district court's order, and the suspension of a valid state statute, it will serve not merely as a basis for this remedial order, but rather as a permanent source of justification for an entitlement to a certain percentage of minority officers on the city's police and fire forces. See Pasadena v. Spangler, 427 U.S. at 433-434; Fullilove v. Klutznick,

448 U.S. 448, 539 (1980)(Stevens, J., dissenting).[17]

B. The Legal Basis for the Original Findings of Constitutional Violations Was Discredited By This Court And Therefore Formed An Insufficient Predicate For The District Court's Orders.

The district court also abused its discretion by suspending operation of a valid state statute because the legal basis for the original findings of unconstitutional discrimination in the police case was explicitly discredited

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17/ Ironically, the right to such an entitlement was expressly rejected by the police case trial judge in his opinion following remand, Castro v. Beecher, 365 F. Supp. 655, 659 (D. Mass. 1973):

> [The desirability of a police force drawn from all groups] does not imply that any group is entitled to a qucta, nor to a fraction roughly corresponding to the fraction of the total population which belong to that group.

by this Court in Washington v. Davis, 426 U.S. 229 (1976). Without exception, every decision rendered in both cases has found that, to the extent discrimination occurred, that discrimination was unintentional. See, e.g., Castro v. Beecher, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971); Castro v. Beecher, 459 F.2d 725, 727 (1st Cir. 1972); Boston Chapter, NAACP v. Beecher, 371 F. Supp. at 519-520.

In Washington v. Davis, however, the Court noted that various courts of appeal had erroneously held proof of a disproportionate impact sufficient, in the context of public employment, to prove racial discrimination in violation of the Equal Protection Clause. The Court cited Castro v. Beecher as a case wrongly decided. Washington v. Davis, 426 U.S. at 244 n.12. Despite this express disap-

proval, the court of appeals justified the scope of the district court's order by reference to the violations found in the original suits. Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. (P.A. 45) The court stated that the "independent violations" found in the original suits distinguished the cases from related Title VII decisional law[18/] and characterized the "basic issue at stake" in the cases as "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." Id. (emphasis added).

While the state petitioners do not contest the fact that discrimination claims were once litigated, and that

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18/ See Section II, infra.

findings were entered against them, they do contest present reliance on those discredited constitutional conclusions to justify the "modification" of the court's prior orders to encompass relief never at issue in the "litigated" cases. The district court's power was circumscribed by the disfavored legal underpinnings of its original decisions. Reliance on the original erroneous conclusions to supersede a valid Massachusetts law only compounded the lower courts' original mistakes.19/

Respondents attempt to palliate Washington v. Davis by dismissing the State's argument as a "collateral attack

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19/ Alternatively, reliance by the lower courts on "findings" based on the United States' Title VII claim in the fire case would squarely conflict with Title VII's express protection of bona fide seniority systems and decisions of this Court upholding that protection. See Section II, infra.

upon earlier judgments and a challenge to all ongoing relief."[20/] The State mounts no such assault. The State's opposition to the "modification" of prior orders implies no challenge to the orderly processes of examination and certification established by judicial decree and ratified by subsequent agreements of the parties. The district court's "modification," however, invoked equitable powers. The exercise of those powers required a constitutional predicate. The court of appeals identified that predicate as the "independent violations" found in the original suits. Since remedy must correspond to violation, Milliken v. Bradley, 418 U.S. at 744, unintentional violations resting on

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20/ Brief of Respondents in Opposition to Petitions for a Writ of Certiorari at 20.

discredited legal principles necessarily form weaker legal predicates than intentional violations based on undisturbed law. Furthermore, the strength of original findings offered as legal predicate for the extension of equitable power must be assessed not by reference to the prevailing law at the entry of those findings but to the law at the entry of further equitable relief, because it is only then that the true scope of the violation can be accurately determined. See Milliken v. Bradley, 418 U.S. at 744.

Massachusetts does not contend that Washington v. Davis destroyed the constitutional predicate for the relief originally granted by the district court. The extension of that relief, however, to matters wholly outside the scope of the original constitutional violations

and prior court decrees requires examination of all aspects of the proffered predicate. In this case, measurement of the legal underpinnings of the district court's August 7, 1981, orders reveals fatal structural flaws.

II. THE LOWER COURT DECISIONS CONTRADICT RECENT DECISIONS OF THIS COURT UPHOLDING BONA FIDE SENIORITY SYSTEMS.

Title VII of the Civil Rights Act establishes that:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate[.]

42 U.S.C. §2000e-2(h).

The Court examined this language in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

There the Court held that a neutral and bona fide seniority system does not violate Title VII even if it perpetuates prior discrimination. Id. at 352-355. In Teamsters, the Court addressed job assignments and promotions made in compliance with seniority strictures. Id. at 349-350. The Court held that a disproportionate impact on last-hired minorities does not, standing alone, invalidate a facially-neutral seniority system. Id. at 352.

Two recent Supreme Court decisions have reaffirmed these precepts. American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S. Ct. 1534 (1982) (American Tobacco) and Pullman-Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781 (1982) (Pullman-Standard). Both cases addressed issues regarding the construction and application of 42 U.S.C. §2000e-2(h). More

importantly, both cases underscored the protection afforded bona fide seniority systems by the statute. American Tobacco stated that the statute "exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices." Id. at 1541. The fact that independent, discriminatory employment practices are "perpetuated" by application of a bona fide seniority system does not form a sufficient basis for invalidation of the system. American Tobacco, 102 S. Ct. at 1541. Absent a discriminatory purpose in application or operation of the system, the system itself is not an unlawful employment practice even if the system has some discriminatory consequences. Pullman-

Standard, 102 S.Ct. at 1784, citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977). This result accords with the congressional judgment that:

> [T]itle VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Teamsters, 431 at 352-353.

Application of Mass. Gen. Laws Ann. ch. 31, §39, should be evaluated in accordance with these tenets, as well as reference to the principles of equity jurisprudence and federalism enunciated in Sections I and III of this brief. Since §39 sets forth precisely the type of seniority-based layoff system envisioned by 42 U.S.C. §2000e-2(h) and up-

held by the Supreme Court,[21] it should control the layoffs in this case.

The fact that the district court "suspended," rather than invalidated, the bona fide seniority system embodied in Mass. Gen. Laws Ann. ch. 31, §39, renders its orders no less offensive to these precepts. The district court could not by "suspension" of state law or "modification" of prior orders circumvent the protection afforded bona fide seniority systems by this Court. That protection extends not only to preservation of the system, but to protection of

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21/ The Court has defined a "seniority system" as "a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." California Brewers Association v. Bryant, 444 U.S. 598, 606 (1980).

particular applications of seniority provisions to events such as reductions in force expressly covered by the system and vital to its operation. To ignore the system under such circumstances actually invalidates its operation: the practical effect of the "suspension" of §39 on those ostensibly protected by seniority is indistinguishable from the effect of an order declaring application of §39 violative of Title VII or the Constitution.

Here, however, the lower courts found sufficient justification to override bona fide seniority rights. The court of appeals stated:

> We find nothing in [Teamsters, Franks and American Tobacco] that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. . . . None of the Supreme Court cases apply

> to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. (P.A. 45)[22/] The court of appeals thus distinguished the cases before it from the Title VII precedents on the basis of: (1) the "independent," litigated findings of discrimination; and (2) the Court's power to preserve relief achieved pursuant to previous orders.

These considerations did not justify the relief ordered. It may well be that

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22/ Compare Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982) petition for cert. filed August 5, 1982, 51 U.S.L.W. 3120 (advancing several theories to permit consent decree to alter collective bargaining agreement seniority provisions).

independent, litigated findings of discrimination in employment practices may entitle persons affected by those practices to full relief, including their rightful place in the seniority system, see Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); that such relief may insulate those persons from the effects of a "last-hired, first-fired" layoff system; and that a court may act to insure that result. Only those victimized by the discriminatory practices, however, may invoke such protection. For example, individuals who fail to timely challenge discrimination cannot later complain of a "continuing violation" embodied in the seniority system.[23/]

23/ Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1187 (E.D. Pa. 1977), aff'd in part, vacated on other grounds, Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981) (en banc).

Similarly, those persons not victimized by past acts of discrimination should not be afforded relief that suspends valid statutory seniority provisions, because no factual predicate exists for such relief.

Notwithstanding these limitations on plenary relief, the district court's orders benefited primarily persons who could not have been harmed by past acts of discrimination. See Boston Chapter, NAACP v. Beecher, 679 F.2d at 976 and 976 n.14. (P.A. 54-56)[24/] The district court conducted no hearings to identify which of the police and firemen scheduled for layoff could not have been victimized by the past discriminatory examination and certification practices. Indeed the

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24/ See pp. 44-47. supra.

fact that the relief protected individuals most recently hired ensured that few, if any, members of the original class would benefit from the most recent orders. See id.

Thus, the distinction drawn by the court of appeals between this case and the Title VII decisional law upholding seniority rights -- "the litigated findings of discrimination" -- does not support the district court orders because those findings do not justify the extension of relief to individuals who could not have been victimized by past discrimination. Furthermore, any constitutional "findings of discrimination" on which the court of appeals could have relied were explicitly discredited by

this Court in Washington v. Davis.[25/] Under the circumstances, the district court lacked the authority to insulate persons not victimized by discrimination from application of the bona fide seniority system embodied in §39. The court's power to "preserve relief" extended at most to insuring that the victims of discrimination retained their rightful place in the seniority system, protected from discharge under the "last-hired, first-fired" layoff system. See Franks v. Bowman, 424 U.S. 747, 762-770 (1976). The court's foray beyond that well-defined limit warrants reversal.

25/ See Section I.B., supra.

III. THE LOWER COURT DECISIONS CONTRADICT PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND APPLIED BY THIS COURT IN NATIONAL LEAGUE OF CITIES V. USERY.

A. The Tenth Amendment Proscribes Federal Interference With State Sovereignty.

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment X. Thus, powers not delegated to the federal government either expressly or as incidental or implied powers are reserved to the States. Conversely, when the federal government acts in pursuit of certain constitutionally enumerated objectives, it displaces state authority

in its path.[26/] However, the Tenth Amendment guarantees that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The Tenth Amendment thus embodies the constitutional policy that the Constitution's explicit grants of federal authority are subject to an affirmative limitation protecting the sovereignty of the States qua States.

Six years ago the Court gave new voice to this proposition. In National League of Cities v. Usery, 426 U.S. 833

26/ See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)(when Congress regulates private economic activity it may preempt state law); see also Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977) and United States v. Darby, 312 U.S. 100, 113, 115 (1941).

(1976), the Court applied the Tenth Amendment as an "affirmative limitation" upon congressional authority to enact legislation pursuant to its Commerce Clause power which directly impairs state autonomy in areas of government traditionally reserved to the States. National League of Cities declared that by imposing wage and hour regulations upon states as employers through three 1974 amendments to the Fair Labor Standards Act (FLSA),[27/] Congress had interfered with the ability of the States to make decisions affecting "integral" state functions. Id. at 851-52. The Court stated that authority "to structure employer - employee relationships in such areas as fire prevention [and]

27/ See 29 U.S.C. §§203(d), 203(s)(5), 203(x).

police protection . . . " was essential to the "independent existence" of states and thus was an integral element of state sovereignty. Id.

National League of Cities conceded that Congress' 1974 amendments to the FLSA were "undoubtedly within the scope of the Commerce Clause." Id. 841. The Court questioned, however, whether the Act "encounter[ed] a . . . constitutional barrier because [it] applied directly to the States and subdivisions of States as employers." Id. Citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964), the Court reaffirmed its prior holdings that found no Tenth Amendment barrier to Congressional regulation of private economic activity. Id. at 840. The Court noted, though, a profound distinction between the private nature of

the previous objects of federal commercial regulation and the public, sovereign nature of the objects of the FLSA amendments:

> [T]he States as States stand on quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce.

Id. at 854. The Court explained that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." Id. at 845. The Court held that the power to set the wages and work hours of state employees was "an undoubted attribute of state

sovereignty." Id. Since the challenged regulations would "displace the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852, the Court concluded that Congress could not, consistently with the Tenth Amendment, "abrogate the States' otherwise plenary authority to make [these decisions]." Id. at 846.

The Court restated the three inquires that formed the core of the National League of Cities analysis in Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 287-288 (1981). The Court summarized that a congressional enactment violates the Tenth Amendment if it regulates the States as States, addresses matters that are indisputably attributes of state

sovereignty, and directly impairs the States' ability to structure integral operations in areas of traditional governmental functions. Id. Accord, United Transportation Union v. Long Island Railroad, ___ U.S. ____, 102 S. Ct. 1349, 1353 (1982).28/

28/ In Hodel the Court measured portions of the Surface Mining Control and Reclamation Act of 1977 against these standards and reversed a lower court determination that certain of the Act's provisions violated the Tenth Amendment. The Court held that the provisions of the Act governed only the activities of private coal mine operators and therefore did not regulate the "States as States." Id. at 288, 293. In United Transportation the Court held that the Tenth Amendment did not bar application of the Railway Labor Act, 45 U.S.C. §§151 et seq., to a state owned railroad because operation of the railroad was not an "integral part of traditional state activities." Id. at 1354. For the reasons set forth in subsection III, B, infra at 77-91, these holdings support Massachusetts' argument in this case.

Lower federal courts have applied these principles and invalidated application of the FLSA amendments to a variety of "integral governmental functions."[29/] The courts have extended the reach of National League of Cities to other congressional enactments under the Commerce Clause as well. In EEOC v. Wyoming, 514 F.Supp. 595 (D. Wy. 1981), prob. juris. noted, 102 S.Ct. 996 (1982), argued October 5, 1982, 51 U.S.L.W. 3282, for example, the court applied the case's

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29/ See, e.g., Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979)(operation of municipal airport); Enrique Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841, 843-846 (1st Cir. 1982)(operation of highway authority which builds and maintains roads); Alewine v. City Council of Augusta, 505 F.Supp. 880, 888-89 (S.D. Ga. 1981)(operation of municipal transit system); Dove v. Chattanooga Area Regional Transportation Authority, 539 F.Supp. 36, 39-42 (E.D. Tenn. 1981)(same).

holding to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621 et seq. (ADEA). The court held that application of the ADEA to a Wyoming statute which permitted mandatory retirement of a game warden at age fifty-five would adversely affect the state's management of its wildlife resources and therefore violate the Tenth Amendment.30/

It is of no constitutional significance that this case poses a conflict between integral state governmental functions on the one hand and the exercise of judicial, as opposed to legislative power on the other. The principles of

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30/ See also Taylor v. Department of Fish and Games, 523 F.Supp. 514 (D. Mont. 1981).

federalism embodied in the Constitution apply to the federal judiciary as well as to Congress. United States Constitution Amendment XI. See Hans v. Louisiana 134 U.S. 1, 10-11 (1890); Chisholm v. Georgia, 2 U.S. (Dallas) 419 (1792). The Tenth Amendment protects state governments from improper federal encroachment whatever its source. National League of Cities' principles thus apply with equal force to orders of a federal court which displace or impede integral governmental functions and usurp powers reserved to the States by the Tenth Amendment. Davids v. Akers, 549 F.2d 120, 127 (9th Cir. 1977). In Davids v. Akers the Ninth Circuit affirmed the dismissal of an action brought by members of the Arizona House of Representatives and Arizona voters against the Speaker of the House

which challenged committee appointment procedures utilized by that body. The court rejected plaintiffs' constitutional claims and added that the language of National League of Cities "strengthened" the court's conclusion. The court found the principles of National League of Cities fully applicable to federal court orders:

> It is true, of course that in Usery the Court dealt with the power of Congress, while here we deal with the power of the federal courts. But the principle is the same. Indeed, if what the Court says about a Congressional enactment, to which the Supremacy Clause expressly applies, is correct, it should apply to the power of the federal court.

549 F.2d at 127.[31/] This Court

31/ Accord, United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (limitations on power of Congress recognized in National League of Cities apply equally to the power of the federal courts; federal magistrate's suspension of motorist's California driver's license interferes with "integral" state governmental function).

suggested similar application of Tenth Amendment principles in dicta in FERC v. Mississippi, __ U.S. ___, 102 S. Ct. 2126, 2142-2143 n.32 (Tenth Amendment permits "challenge to federal interference" with state sovereignty) (emphasis added). Accordingly, the August 7, 1981, order of the district court may be properly measured against the legal framework erected by National League of Cities.

B. The District Court Order Violated The Tenth Amendment.

The August 7, 1981, order of the district court in this case regulates the "States as States," addresses "matters that are indisputably attributes of state sovereignty," and "directly impairs the States' ability to structure integral operations in areas of traditional governmental functions." Hodel,

452 U.S. at 287-288; United Transportation Union, 102 S.Ct. at 1353.

The federal court order manifestly regulates the "States as States." The order suspends operation of a valid state law directly applicable to the police and fire layoffs and never challenged in these cases. Indeed, the First Circuit's opinion concedes that "the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts Civil Service statute, Mass. Gen. Laws Ann. ch. 31, §39." 679 F.2d 965, 973 (1st Cir. 1982) (P.A.38)[32/] The order directly imposes

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32/ The First Circuit later appears to qualify this statement by suggesting that "[t]he order was designed to operate within the framework of the statute, although modifying it to the extent necessary to preserve the integration already achieved." 679 F.2d at 975. (P.A. 48) In their Brief in Opposition to

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specific duties on state and local officials.[33] The order imposes no duties whatsoever on private persons or organizations.[34] Nor is the "ultimate

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(footnote continued)

Petitions for Certiorari at 16 respondents propound the same myth, but the record permits only one characterization: that the district court order superseded a valid state law.

33/ See n.36, infra. The fact that the orders mandate local as well as state action does not diminish their intrusiveness under governing Tenth Amendment principles. See National League of Cities, 426 U.S. at 851 and 855-856 n.20. The sovereignty of States rests in large part on their authority to organize and supervise local governments. Id. See Massachusetts Constitution, Amendment Article II §§1-8. See also Frug, The City as Legal Concept, 93 Harv. L. Rev. 1059 (1980).

34/ Contrast Hodel, 452 U.S. at 288 ("Surface Mining Act govern[s] only the activities of coal mine operators who are private individuals and businesses") and FERC v. Mississippi, ___ U.S. ___, 102 S.Ct. 2126, 2141 (1982). Contrast also State of Minnesota v. Block, 660 F.2d

(footnote continued)

aim" of the orders the regulation of private activity.[35] The orders directly and exclusively regulate the activities of state and local government officials and thus regulate the "States as States."

The orders also address "attributes of state sovereignty." The orders of the federal district court directly impose duties on state and local officials that contradict their fundamental statutory duties to regulate public safety

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(footnote continued)

1240,1251-1253 (8th Cir. 1981)(provisions of Boundary Waters Canoe Area Wilderness Act of 1978 restricting use of motorboats and snowmobiles on land and waters under state jurisdiction regulate private individuals, not "States as States").

35/ See FERC v. Mississippi, 102 S. Ct. at 2147 (O'Connor, J., dissenting in part).

employment.[36] The district court provided no discretion to state and local officials to ignore or modify its judicial mandates.[37] Rather, the

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36/ The district court enjoined City of Boston officials from reducing by layoff the percentage of minority police and firefighters below August 7, 1981, levels; ordered those officials to "establish and maintain separate seniority lists" for minority and non-minority officers; ordered them to compute seniority within each list, and to terminate the least senior officers "from each of the two lists according to a mathematical ratio so that the percentage of minority [officers] at no time [would fall] below 14.7 percent"; enjoined Massachusetts Civil Service Commission officials from invalidating the terminations for failure to follow statutory seniority provisions; and ordered the Massachusetts Personnel Administrator to establish and maintain lists of terminated officers and to certify officers for reinstatement in reverse order of their layoff so as to preserve at all times the August 7, 1981, percentage of minority officers.

37/ Contrast Hodel, 452 U.S. at 288 (States "not compelled to enforce the [federal] standards or to expend state funds"; Surface Mining Act therefore

(footnote continued)

officials face the alternatives of compliance with orders contradicting their state law duties or contempt.

The power to determine the method of termination of public safety officers in the Commonwealth lies at the core of state sovereignty. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." FERC v. Mississippi, 102 S. Ct. at 2138. Sovereignty thus rests primarily in the States' power to make choices and decisions fundamental to their role as providers of traditional public services such as police and fire protection. Surely if a "State's power

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(footnote continued)

does not "commandeer" the "legislative processes" of the States) and FERC v. Mississippi, 102 S. Ct. at 2140 (nothing in PURPA "directly compelling" the States to enact a legislative program).

to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, [the] hours those persons shall work, and [the] compensation [that] will be provided" for overtime work is "[o]ne undoubted attribute of state sovereignty," National League of Cities, 426 U.S. at 845, a State's power to determine the formula by which its public safety officers are separated from their employment is another. In fact, the legislature's determination of the appropriate method for terminating public safety personnel for fiscal reasons actually exceeds in importance the "determinations" of the conditions of public employment previously found by the Court to be "essential" to a State's "separate and independent existence," National

League of Cities, 426 U.S. at 845, because layoff decisions ordinarily pose greater threats to the efficient operation of public service agencies.[38] The recent orders of the district court displace this fundamental state decision. For this reason, the orders directly impinge upon the sovereignty of the Commonwealth of Massachusetts.

Finally, the order directly impairs the States' ability to "structure integral operations in areas of traditional governmental functions." National League of Cities, 426 U.S. at 852. Indeed, application of Mass. Gen. Laws Ann. ch. 31, §39, to the police and fire layoffs in this case represents one of the "govern-

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38/ The state petitioners discuss the importance of seniority to the operation of public safety agencies at pp. 87-89, infra.

mental functions" -- regulation of employment in police and fire departments -- enumerated by National League of Cities as "typical" of those "traditionally afforded" citizens by their state and local governments and therefore essential to a state's "independent existence." Id. at 850-851.

The nature of the function supports this conclusion. State and local governments have historically been the principal providers of police and fire services.[39/] The protection offered by local police and fire departments benefits the entire community, draws upon

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39/ National League of Cities, 426 U.S. at 851. See Massachusetts Retirement Board v. Murgia, 427 U.S. 307, 314-317 (1976)(regulation of physical condition of public safety officers represents a legitimate purpose of state legislation).

public funds, and is undertaken for the purpose of public service rather than pecuniary gain.

State and local governments are particularly well suited to the tasks of police and fire protection because of the state-wide need for those services. "Indeed, it is functions such as [fire prevention and police protection] which governments are created to provide, services such as these which the States have traditionally afforded their citizens." Id. at 851.40/

40/ One commentator suggests that the focus in National League of Cities on "traditional areas of state control" parallels the Framers' determination that by reserving to the States powers over "familiar concerns," The Federalist Papers, No. 16 at 116, (Mentor ed., 1961), such as "internal order," id. No. 45 at 292-93, the Constitution would protect the States' "capacity to elicit loyalty by providing for the needs of their residents." Nagel, Federalism As A Fundamental Value: National League of Cities in Perspective, The Supreme Court Review, 1981, (Kurland, et al. ed.

(footnote continued)

Furthermore, the order "directly impairs integral operations" in this area. Implementation of the order significantly alters the "employer-employee relationship" established by valid state law and supervised by state and local officials because it overrides a seniority provision that traditionally forms a cornerstone of that relationship. Seniority provisions have "become of overriding importance, and one of [their] major functions is to determine who gets or who keeps an available job." Humphrey v. Moore, 375 U.S. 335, 346-347 (1964); Franks v. Bowman Transportation, 424 U.S. at 747. They "are universally included"

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University of Chicago Press)(1982) at 81, 101-109. Professor Nagel maintains that "[t]he longer an area has been subject to state control the more symbolic of state authority that area becomes." Id. at 102.

in collective bargaining contracts. American Tobacco Co. v. Patterson, ___ U.S. ____, 102 S.Ct. at 1541 (1982), quoting Trans World Airlines v. Hardison, 432 U.S. 63, 79 (1977). "[D]etioration in morale, labor unrest, and reduced productivity" often accompany disruption of an existing seniority system. See Ford Motor Co. v. E.E.O.C., ___ U.S. ___, 102 S. Ct. 3057, 3064 (1982).

Entitlements conferred by credits earned under the Massachusetts civil service seniority system likewise play a key role in the operation of local police and fire forces. Both public employers and employees rely on the seniority system to structure the allocation of benefits and privileges within local departments. Disruption of that system

in the public safety area not only produces the inefficiency cited in Ford Motor Co., supra, but endangers the public by fraying the formal and informal relationships between management, superior officers, and officers essential to effective police and fire protection. This disruption causes a "direct impairment of integral operations" which violates Tenth Amendment principles.

The orders entered by the District Court thus satisfy each element of the tripartite test established by National League of Cities and restated by Hodel.[41/] Under the circumstances of

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41/ In both Hodel and United Transportation Union the Court noted that under certain circumstances "the nature of the federal interest advanced may be such that it justifies state submission." Hodel, 452 U.S. at 288 n.29; United Transportation Union, 102 S. Ct. at 1353 n.9. The Court "has not yet explored the

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this case, the Tenth Amendment prohibits judicial interference, by "modification" of prior remedial orders or any other means, with an integral state function absent a finding that the applicable state law is unconstitutional. The lower court decisions in this case, superseding a valid state statute, contravene rights reserved to the Commonwealth of Massachusetts by the Tenth Amendment. Contrary to the principles of federalism

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circumstances that might justify such an exception." FERC v. Mississippi, 102 S. Ct. at 2147 n.4 (O'Connor, J., dissenting). Even if the Court's language may be interpreted to adopt an ad hoc balancing test which weighs the federal interest against the state activity sought to be displaced by federal mandate, the narrow scope of the original violations in these cases, the discredited constitutional underpinnings of the original decisions, and the protection uniformly afforded bona fide seniority systems by Congress and this Court require that the balance in this case be struck for the state.

embodied in that Amendment, the provisions of a presumptively valid state statute have been set aside notwithstanding the fact that no direct challenge to the statute was ever mounted and the underlying cases never implicated the layoff of public safety personnel. The justification for the action is the remedial authority of the district court, i.e., its ability to implement an eleven year old decision which this Court has already described as erroneous. Such action necessarily enervates the Tenth Amendment and its underlying doctrines.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the First Circuit.

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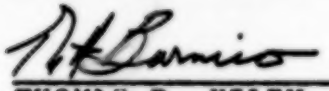

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

42 U.S.C. §2000e-2(h)

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Massachusetts General Laws Ann. ch. 31, §6 (West)

Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven, except as otherwise provided by this chapter or other law.

Each such original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply, except as otherwise provided by sections twenty-six, forty, forty-seven, fifty-six, and sixty.

An appointing authority desiring to make an original appointment in the official service shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition, the administrator shall certify from such list the names of persons eligible for such original appointment. If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request authorization to make a provisional appointment pursuant to sections twelve, thirteen and fourteen.

An appointing authority may requisition to fill any position by original appointment pursuant to this section, or, where a promotional appointment may be made under the civil service law and rules, it may requisition to fill a position by promotional appointment pursuant to section seven.

Any request by an appointing authority to the administrator to fill a vacancy, other than temporary vacancy,

in a permanent position shall include a statement that such position is permanent and that such vacancy is to be filled on a permanent basis.

Massachusetts General Laws Ann. ch. 31, §58 ¶2 (West)

A person shall be ineligible to become an applicant for an examination for original appointment to the position of fire fighter or the position of police officer in a city or town if he will not have reached his nineteenth birthday or will have reached his thirty-second birthday on or before the final date for the filing of applications for such examination, as stated in the examination notice.

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Nos. 82-185, 82-246, 82-259

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Question Presented

Having previously found discriminatory exclusion of racial minorities from a city's police and fire departments, and having previously established a program of relief designed to remedy the effects of that discrimination, did the district court properly exercise its discretion when, in order to prevent the substantial eradication of the court's remedial efforts, it prohibited the reduction of current proportionate representation of minority officers when the city undertook a massive and unforeseen program of seniority-based layoffs?

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Akins v. Texas, 325 U.S. 398 (1945) 42

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Alejandrino v. Quezon, 271 U.S. 528 (1926) 66

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 43, 44, 45

American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1534 (1982) 59

Arnold v. Ballard, 390 F.Supp. 723 (N.D.Ohio 1975) 34

Ass'n Against Discrimination v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1611 (1982) 28, 47

Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952) 41

Bolden v. Pennsylvania State Police, 73 F.R.D. 370 (E.D.Pa. 1976) 23

Bolden v. Pennsylvania State Police, 578 F.2d 912 (3rd Cir. 1978) 43

Bond v. Floyd, 385 U.S. 116 (1966) 66

Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507 (D.Mass.), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) passim

Bridgeport Guardians, Inc. v. Members of the Bridgeport Civ. Serv. Comm'n, 354 F.Supp. 778 (D. Conn.), aff'd in relevant part, 482 F.2d 1333 (2d Cir. 1973) 28, 33, 39

Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528 (1960) 17

Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257 (1978) 18

Brown v. Board of Ed., 349 U.S. 294 (1955) 18

Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954) 25

Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) 23, 31, 43

California v. San Pablo and Tulare R.R. Co., 149 U.S. 308 (1893) 67

Cambridge Housing Authority v. Civil Service Comm'n, 7 Mass. App. Ct. 586, 389 N.E.2d 432 (1979) 66

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972) 26, 28, 39

Castro v. Beecher, 334 F.Supp. 930 (D.Mass. 1971), aff'd in part and rev'd in part, 459 F.2d 725 (1st Cir. 1972), on remand, 365 F.Supp. 655 (D.Mass. 1973) passim

Castro v. Beecher, 386 F.Supp. 1281 (D.Mass. 1975) 2n, 4

Castro v. Beecher, 522 F.Supp. 873 (D.Mass. 1981), aff'd sub nom., Boston Chapter, NAACP, Inc. v. Beecher, 679 F.2d 965 (1st Cir.), cert. granted sub nom., Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, ___ U.S. ___, 103 S.Ct. 293 (1982) passim

Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981) 48

Chrysler Corp. v. United States, 316 U.S. 556 (1942) 23

Coffey v. Braddy, 372 F.Supp. 116 (M.D.Fla. 1971) 40

Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) 18, 22

Comm'r of Admin. v. Kelley, 351 Mass. 686, 223 N.E. 2d 670 (1967) 61

Commonwealth of Pa. v. O'Neil, 473 F.2d 1029 (3rd Cir. 1973) (en banc) 28

Connecticut v. Teal, ___ U.S. ___, 102 S.Ct. 2525 (1982) 53

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 65

Crockett v. Green, 534 F.2d 715 (7th Cir. 1976) 48

Cullen v. Mayor of Newton, 308 Mass. 578, 32 N.E.2d 201 (1941) 61

Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979) 29

Davis v. School Comm'rs of Mobile County, 402 U.S. 33 (1971) 24

Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 (1979) 20, 22

Dennison v. Los Angeles, 658 F.2d 694 (9th Cir. 1981) 40

Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) 33, 36

Director of Civil Defense v. Leger, 9 Mass. App. Ct. 737, 404 N.E.2d 679 (1980) 61

Dothard v. Rawlinson, 433 U.S. 321 (1977) 26

Dozier v. Chupka, 395 F.Supp. 836 (S.D.Ohio 1975) 39, 48

Equal Employment Opportunity Comm'n v. American Telephone and Telegraph Co., 556 F.2d 167 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978) 36, 57, 59

Equal Employment Opportunity Comm'n v. United States Ass'n of Journeymen and Apprentices, 438 F.2d 408 (6th Cir.), cert. denied, 404 U.S. 832 (1971) 23

Erie Human Relations Comm'n v. Tullio, 357 F.Supp. 422 (W.D.Pa. 1973), aff'd, 493 F.2d 371 (3rd Cir. 1974) 28, 39

Erie Human Relations Comm'n v. Tullio, 360 F.Supp. 628 (W.D.Pa. 1973) 34

Evans v. Buchanan, 512 F.Supp. 839 (D.Del. 1981) 23

Ex Parte Virginia, 100 U.S. 339 (1880) 63, 64

Exxon Corp. v. Texas Motor Exchange of Houston, Inc., 628 F.2d 500 (5th Cir. 1980) 23

Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979) 28, 47

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 63, 64

Ford Motor Co. v. Equal Employment Opportunity Comm'n, ___ U.S. ___, 102 S.Ct. 3057 (1982) 57

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 18, 36, 46, 53, 57 et seq.

Fullilove v. Klutznick, 448 U.S. 448 (1980) 34, 35, 36, 37, 38

Glass City Black Brothers United v. Neeb, 540 F.Supp. 852 (N.D.Ohio 1982) 39

Green v. County School Bd., 391 U.S. 430 (1968) 21, 25

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 46

Haskell v. Kansas Natural Gas Co., 224 U.S. 217 (1912) 30

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 19

Hills v. Gautreaux, 425 U.S. 284 (1976) 24

Hutto v. Finney, 437 U.S. 678 (1978) 32

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 21, 26, 53, 59

International Salt Co. v. United States, 332 U.S. 392 (1947) 18

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 43, 44

Jones v. A.H. Mayer Co., 392 U.S. 409 (1968) 45

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 20

Lehman Co. of America v. Appleton Toy & Furniture Co., 148 F.2d 988 (7th Cir. 1945) 41

Lemon v. Kurtzman, 411 U.S. 192 (1973) 18, 19

Local 53 of Int'l Ass'n of Heat & Frost I & A v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 48, 49, 50, 51n

Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 53

Louisiana v. United States, 380 U.S. 145 (1968) 20, 27, 38, 47

Louisville Black Police Officers Org., Inc. v. City of Louisville, 511 F.Supp. 825 (W.D.Ky. 1979) 47

Love v. Waukesha Joint School District #1, Bd. of Ed., 560 F.2d 285 (7th Cir. 1977) 64

Maness v. Meyers, 419 U.S. 449 (1975) 67

Mayberry v. Maroney, 558 F.2d 1159 (3rd Cir. 1977) 41

McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 322 N.E.2d 758 (1975) 61

McDaniel v. Barresi, 402 U.S. 39 (1971) 24

McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) 48

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Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982) 49

Milliken v. Bradley, 433 U.S. 267 (1977) 20, 26, 31, 64

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) 64

Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974) 28

Murphy v. Hunt, 455 U.S. 478 (1982) 68

NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) 28, 33, 37

National League of Cities v. Usery, 426 U.S. 833 (1976) 62, 63

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 44, 62

Nichols v. Comm'r of Public Welfare, 311 Mass. 125, 40 N.E.2d 275 (1942) 61

Norris v. Arizona Governing Committee For Tax Deferred Annuity, 671 F.2d 330 (9th Cir.), cert. granted, ___ U.S. ___, 103 S.Ct. 205 (1982) 64

North Carolina v. Rice, 404 U.S. 244 (1971) 65

North Carolina Bd. of Ed. v. Swann, 402 U.S. 43 (1971) 24, 35

Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) 53

Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976) 41

Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 41

Perrotte v. Percy, 489 F.Supp. 212 (E.D.Wis. 1980) 23

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 60n

Phillips v. Joint Legislative Comm., 637 F.2d 1014 (5th Cir. 1981) 48

Powell v. McCormack, 395 U.S. 486 (1969) 66

Prate vw Freedman, 430 F.Supp. 1373 (W.D.N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978) 39, 40

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 25, 27, 34, 35, 36 et seq.

Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A., 501 F.2d 622 (2d Cir. 1974) 47, 48, 52

Runyon v. McCrary, 427 U.S. 160 (1976) 45

Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979) 23, 39, 40, 41

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 29

Shield Club v. City of Cleveland, 370 F.Supp. 251 (N.D.Ohio 1972) 39, 48

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 67

Sims v. Sheet Metal Workers Int'l Ass'n Local No. 65, 489 F.2d 1023 (6th Cir. 1973) 48

Sisco v. J.S. Alberici Construction Co., 655 F.2d 146 (8th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1485 (1982) 30

Smith v. Missouri Pacific R.R. Co., 615 F.2d 683 (5th Cir. 1980) 40

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 44

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 68

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 18, 19, 20, 25, 29

Swift & Co. v. United States, 276 U.S. 311 (1928) 29, 30

System Fed'n No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642 (1961) 17, 18, 40, 41

Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981), cert. denied, 454 U.S. 1145 (1982) 33

Tangren v. Wachenhut Services, Inc., 480 F.Supp. 539 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, ____ U.S. ___, 102 S.Ct. 1772 (1982) 30

Torre v. Barry, 661 F.2d 1371 (D.C. Cir. 1981) 44

Town of Stow v. Marinelli, 352 Mass. 738, 227 N.E.2d 708 (1967) 67

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 37

United States v. Armour & Co., 402 U.S. 673 (1971) 23

United States v. Borden Co., 308 U.S. 188 (1939) 44

United States v. Carolene Products Co., 304 U.S. 144 (1938) 37

United States v. City of Buffalo, 633 F.2d 643 (2d Cir. 1980) 28, 47

United States v. City of Chicago, 549 F.2d 415, cert. denied, 434 U.S. 875 (1977), remedial order reconsidered and aff'd, 631 F.2d 469 (7th Cir. 1980) 28, 39, 47

United States v. City of St. Louis, 410 F.Supp. 948, amended, 418 F.Supp. 383 (E.D.Mo. 1976), aff'd in relevant part sub nom., Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir.) (consent decree), cert. denied, 434 U.S. 819 (1977) 39

United States v. Christie Industries, Inc., 465 F.2d 1002 (3rd Cir. 1972) 30

United States v. Duke, 332 F.2d 759 (5th Cir. 1963) 39

United States v. Int'l Union of Elevator Const., Local Union No. 5, 538 F.2d 1012 (3rd Cir. 1976) 48, 52

United States v. Ironworkers Local 86, 315 F.Supp. 1202 (W.D.Wash. 1970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) 48, 49, 50, 51n

United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979) 48

United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970) 48, 49, 51n

United States v. Local Union No. 212, IBEW, 472 F.2d 634 (6th Cir. 1973) 48, 52

United States v. Louisiana, 225 F.Supp. 353 (E.D.La. 1963), aff'd, 380 U.S. 145 (1965) 23, 53

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United States v. Masonry Cont. Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) 48

United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964) 27, 38

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United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 46, 48

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United States v. United Brotherhood of Carpenters & J., Loc. 169, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 851 (1972) 47, 48

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 67

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United States v. Ward, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965) 27

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2570 56
7207 45
7213 51n
8219 55
9881-82 51n
12723 51n
13650-52 45
14320 55
117 Cong. Rec. 31960 (1971) 50

118 Cong. Rec. (1972)

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697 50
1662 51
1664 51
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1671-75 50
1676 52
3368-73 45
3959-65 45
7166 50

H.R.Rep. No. 914, 88th Cong., 1st Sess., reprinted in 1964 U.S. Code Cong. and Admin. News, 2405 55

H.R.Rep. No. 238, 92d Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News, 2144 n.2, 2149 n.4, 2152 26, 50

S.Rep. No. 415, 92d Cong., 1st Sess., reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, p. 419 (1972) 26

OTHER AUTHORITIES

American Bar Assn., Standards Relating to the Urban Police Function (1973) 32

The Boston Globe, May 6, 1981, at 1, col. 4. 9

The Boston Globe, May 7, 1981, at 1, col. 3. 9

The Boston Globe, July 9, 1981, at 19, col. 3. 8

The Boston Globe, August 10, 1981, at 1, col. 3. 13

The Boston Globe, November 5, 1982, at 17. 14

Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 Colum. L. Rev. 292 (1982) 57

Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969) 61, 62

Duncan, The Future of Affirmative Action: A Jurisprudential/Legal Critique, 17 Harv. C.R.-C.L. L. Rev. 503 (1982) 28, 53

Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 49n

Lopatka, Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act For Employees Who Protest Discrimination in Private Employment, 50 N.Y.U. L. Rev. 1179 (1975) 58

Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973) 66

National Advisory Commission on Civil Disorders, Report (Bantam ed. 1968) 33

National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime (GPO 1973) 33

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism (GPO 1976) 33

National Commission on the Causes and Prevention of Violence, Violence in America (Bantam ed. 1969) 33

National Commission on the Causes and Prevention of Violence, To Establish Justice and Insure Domestic Tranquility (Bantam ed. 1970) 33

Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975) 39, 54

Note, Last Hired, First Fired Seniority, 11 Colum. J.L. & Soc. Probs. 343 (1975) 53

Poplin, Fair Employment in a Depressed Economy, 23 U.C.L.A. L. Rev. 177 (1975) 61

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (GPO 1967) 32

President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (GPO 1967) 33

United States Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination (1981) 27, 54

Vaas, Title VII: Legislative History, 7 B.C. Ind. Com. L. Rev. 431 (1966) 55

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Respondents

Statement Of The Case

These are civil rights cases. They arose out of state civil service practices which were found to have historically excluded

blacks and hispanics from the Police and Fire Departments of the City of Boston. Remedial measures designed to eliminate the effects of this exclusion were ordered and had been in operation for several years when, in 1981, the City implemented a massive reduction in force program. Upon motions to modify prior remedial orders, the district court prohibited reduction of current minority proportional representation and enjoined implementation of the program insofar as it would operate strictly in accordance with the Massachusetts civil service seniority statute. Asserting the absolute priority of seniority expectations, petitioners challenge the district court's power to prevent the frustration and substantial eradication of the ongoing remedial process.

The judgment under review was entered in two consolidated actions which have lengthy histories. One case relates to the Boston Police Department, the other to the City's Fire Department.[1]

A. *Prior Proceedings*

1. The Police Case

The police action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Plaintiffs claimed racial discrimination, in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and

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[1] The opinion of the court of appeals is reported at 679 F.2d 965 (1st Cir. 1982), and the opinion of the district court is reported at 522 F.Supp. 873 (D.Mass. 1981). The police case, entitled below *Castro* v. *Beecher*, was previously reported at 334 F.Supp. 930 (D.Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D.Mass. 1973); and 386 F.Supp. 1281 (D.Mass. 1975). The fire case, entitled below *Boston Chapter, NAACP, Inc.* v. *Beecher*, was previously reported at 371 F.Supp. 507 (D.Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); and 423 F.Supp. 696 (D.Mass. 1976). Certain of the unreported decisions, decrees and stipulations are reproduced in the Joint Appendix ("Jt. App."). The appendix to the Boston Firefighters Union Petition for Certiorari is referred to as "Pet. App."; the appendix to the Boston Police Patrolmen's Union Petition for Certiorari is referred to as "Pol. App."

1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police Department as well as other appointing authorities subject to Massachusetts civil service regulations. *Castro* v. *Beecher*, 334 F.Supp. 930, 934 (D.Mass. 1971). In 1970, only 65 of 2,805 Boston police officers were black or hispanic, representing but 2.3 percent of the total complement of sworn officers; the minority population of Boston, however, exceeded 16 percent at the time. *Castro* v. *Beecher*, 459 F.2d 725, 730 (1st Cir. 1972).[2]

Following trial, the district court found that the Massachusetts civil service police entrance examination discriminated against minorities, including plaintiffs, who did not share "the prevailing white culture." 334 F.Supp. at 935-36, 943. On appeal the Court of Appeals for the First Circuit held that the civil service examinations were racially discriminatory. *Castro* v. *Beecher*, *supra*, 459 F.2d at 730-33. The court of appeals remanded the case with instructions that the district court enter a remedial order which "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that the relief fashioned by the district court "is to be more than token." *Id.* at 737.

Following remand the district court approved a consent decree which provided various remedial measures, including the establishment of civil service certification priority pools consisting of black and hispanic applicants and the implementation of affirmative recruitment programs aimed at blacks and hispanics. *Castro* v. *Beecher*, 365 F.Supp. 655, 660-62 (D.Mass. 1973).

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[2] Although the district court originally referred to the percentage representation of blacks on the police force in 1970 as 3.6 percent, *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 935, the court subsequently corrected the figure to "hardly 2%," *id.*, 365 F.Supp. at 665. The court of appeals figure of 2.3 percent was derived from computation based upon specific personnel statistics in the record.

In 1975 plaintiffs brought another action, pursuant to the All Writs Act, 28 U.S.C. § 1651, to clarify and preserve the effect of the district court's decree in light of litigation which had taken place in the Massachusetts courts relating to the appointment of police officers in accordance with statutory preferences. The district court held that the priority pools established by the decree superseded the statutory scheme of preferences, but that the statutory preferences remained in effect within the several pools. *Castro* v. *Beecher*, 386 F.Supp. 1281, 1285 (D.Mass. 1975). The district court requested that the parties agree upon a substitute consent decree and recommended the comprehensive remedy adopted in the meantime in the fire case, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D.Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974). *Castro* v. *Beecher*, *supra*, 386 F.Supp. at 1286.

Thereafter the parties entered into a further consent decree, which was approved by the district court on July 7, 1975. (Jt. App. 52-63.) The decree required various race-conscious measures, including certification of police applicants by methods designed to facilitate the appointment in the cities of Boston and Springfield of one minority police officer for each white police officer and the appointment by other appointing authorities on a ratio of one to three. The decree provided that its remedial measures shall apply to any city or town which has a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community." (Jt. App. 63.)

On July 13, 1976 and on June 1, 1979, the district court entered supplemental decrees. These decrees required various continuing remedial measures. They also discharged from the court's jurisdiction the police departments of eighty-one cities and towns which had attained the proportional representation remedial target according to current census statistics. (Jt. App. 64-69, 70-77.)

2. The Fire Case

The fire case was commenced in 1972 by the NAACP and unsuccessful black and hispanic applicants for appointment as Boston firefighters. As in the police case, plaintiffs claimed racial discrimination, in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Fire Department as well as other appointing authorities. In 1973 the Attorney General brought an action raising similar claims, together with claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the two actions were consolidated. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 509-10. At the time of trial, in 1974, only 18 of 1,983 Boston firefighters were black or hispanic, representing a mere 0.9 percent of the total. *Id.* at 514. Yet the minority population of the city was by then approximately 23 percent. *Id.* at 514.

Following trial, the district court found that plaintiffs had been victims of racial discrimination through the administration of a type of civil service examination which had been in use for at least twenty years. *Id.* at 511, 514, 517. The district court then ordered a program of affirmative recruitment of minority firefighters, enjoined further use of the civil service examination, ordered development of a job-related examination and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. The district court ordered that the remedial measures remain in force for any city or town with a minority population greater than one percent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community." *Id.* at 523.

Appeal followed. Relying substantially on its earlier opinion in the police case, *Castro* v. *Beecher*, *supra*, 459 F.2d 725,

the court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974). This Court denied certiorari. 421 U.S. 910 (1975).

Subsequent to the 1974 decree, the district court entered several further consent decrees and stipulations to effectuate its original order. These orders set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, appointments and notice and reporting. (Jt. App. 9-18, 19-22, 32-34, 35, 36-41.)

B. *Prior Remedial Measures*

Following adjudication of liability, the lower courts in both cases confronted public safety departments which starkly reflected the past discrimination. The exclusion of blacks and hispanics was evident, and the original remedial measures addressed this condition. In the fire case, for example, the district court characterized its decree as designed to eliminate the "present effects of past discrimination." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 520. On review the court of appeals noted that in the prior police case it had required the district court to institute suggested remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 504 F.2d at 1026. The court of appeals found, similarly, that the remedial measures in the fire case went "no further than to eliminate the lingering effects" of discrimination. *Id.* at 1027.

In keeping with its focus on the present effects of past discrimination, the original remedial orders provided principally for two affirmative measures: priority certification of minority applicants and minority recruitment. The remedial scheme did not seek to provide compensation on an individual basis. No attempt was made to slot individual applicants into positions which they would have occupied absent personal victimization by discrimination, and no effort was undertaken to give

notice to, identify or give relief to individuals who had been discouraged from applying by virtue of the state's long-standing practices. The approach taken was informed by the view that the remedy adopted would "yield a significant increment" of minority officers "in the near term." *Castro* v. *Beecher*, *supra*, 459 F.2d at 737. Relief was prospective and corrective, not retrospective and compensatory.

The original relief was restrained, and it was designed to achieve its objective over time. The remedial orders contemplated their own extinction, upon achievement of the remedial target, and many local appointing authorities have since been relieved of the court's continuing jurisdiction. (See docket sheets, *passim*.) To the extent possible, the lower courts have allowed and encouraged the parties to agree upon remedial measures, notwithstanding the district court's early experience with a "dilatory and otherwise obdurate" Civil Service Commission, *Castro* v. *Beecher*, *supra*, 365 F.Supp. at 657, and the state officials' failure for several years to adopt firefighter recruiting measures ordered by the court (See Jt. App. 36-41; Boston Chapter, NAACP, Inc. Motion for Further Relief, Docket No. 72-3060-F, D.Mass., August 7, 1979; Motion of United States, Docket No. 72-3060-F, D.Mass., October 17, 1979). Certification and hiring of eligible applicants following each succeeding civil service examination has been the subject of negotiation among the parties. Consequently, the district court has never intervened to approve or disapprove the examinations administered following the original decree; indeed, but for the negotiation and entry of interim consent decrees which have governed the administration of those examinations and use of their results, those examinations would have continued to exclude blacks and hispanics from both the Police and Fire Departments. (*E.g.*, Jt. App. 19, 64.)

Between 1974 and 1980 the Boston Police and Fire Departments made progress toward correcting the effects of past discrimination. During this period the Police Department hired

492 officers, of whom 213 (or 43 percent) were black or hispanic. (Jt. App. 79.) As a result, on July 6, 1981, 224 of a total 1,912 officers were black or hispanic, and minority representation had risen to 11.7 percent. (*Id.*) During the same period the fire department hired 553 sworn personnel, of whom 248 (or 45 percent) were black or hispanic. (Jt. App. 43.) By July 7, 1981, 248 of a total 1,690 firefighters were black or hispanic, and minority representation in that department had risen to 14.7 percent. (*Id.*) However, by 1981 the black and hispanic population of the city had risen to between 29 and 30 percent, and minority representation in both departments remained far below the remedial target. Indeed it remained well below the level of minority representation in the City's population at the time of the original decrees. (*Id.*) By mid-1981 the remedial process was still ongoing and far from completed.

C. *The 1981 Layoffs*

In early 1981 the City of Boston announced that it faced unanticipated budgetary constraints. The City, as a result of recent state court decisions, owed commercial property owners in excess of $50 million due to its long-standing practice of assessing real estate in a manner that violated the Massachusetts Constitution;[3] the City faced property tax limitations recently imposed on it by an initiative referendum locally known as "Proposition 2 ½";[4] and the City's School Department unlawfully continued to spend funds vastly in excess of its budget.[5] (See July 30, 1981 transcript pp. 3-24; *The Boston Globe*, July 9, 1981, p. 19.)

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[3] July 30, 1981 transcript pp. 12-13, 15; see *Tregor* v. *Board of Assessors of Boston*, 377 Mass. 602, 391 N.E.2d 1225 (1979).

[4] July 30, 1981 transcript pp. 11-12; see 1980 Mass. Acts c. 580.

[5] July 30, 1981 transcript p. 13; see *Board of Education* v. *Boston*, 386 Mass. 103, 434 N.E.2d 1224 (1982).

In March 1981, the City chose to institute a massive reduction in force program in its Police and Fire Departments prior to the June 30, 1981 end of the 1981 fiscal year. The City announced plans to lay off personnel in accordance with the Massachusetts civil service statute, which requires layoffs in reverse order of seniority. Mass. Gen. Laws c. 31, § 39. As a result, City officials projected that by July 1, 1981 the level of black and hispanic personnel would be reduced to approximately 3 percent in the Police Department. (*Castro* v. *Beecher*, Docket No. 70-1220-C, April 22, 1981 Supplemental Stipulation, par. 6-8.) Similarly, the City planned to reduce the level of minority personnel in the Fire Department to approximately 1.5 percent. (*Boston Chapter, NAACP, Inc.* v. *Beecher*, Docket No. 72-3060-McN, April 21, 1981 Stipulation, par. 20-22.)

In early April 1981, shortly after initial termination notices were issued, plaintiffs filed motions to modify the district court's prior remedial orders, seeking relief substantially identical to that later granted. (Jt. App. 42, 78.) The district court heard argument in the fire case and scheduled argument in the police case. Promptly thereafter negotiations among city and state officials led to passage of special legislation providing for payment of an overdue cash reimbursement by the Commonwealth of Massachusetts to the City. 1981 Mass. Acts c. 121. (See *The Boston Globe*, May 6, 1981, p. 1, col. 4; May 7, 1981, p. 1, col. 3; *Castro* v. *Beecher*, Docket No. 70-1220-C, Affidavit of Chester J. Broderick, President, Boston Police Patrolmen's Ass'n, May 1, 1981.) The City thereupon rescinded the reduction in force program through the end of fiscal 1981, and the district court continued plaintiffs' motions.

Responsible efforts to deal with the City's financial affairs, however, were short-lived. By early July 1981, at the outset of the City's 1982 fiscal year, the Mayor, the City Council and elected state officials had failed to reach a compromise. The Mayor then ordered implementation of an interim City budget, which made a "worst case" series of financial assumptions and once again called for massive layoffs in the Police and Fire De-

partments. City officials announced the intention to implement layoffs in six weekly waves, running from early July to mid-August, and the layoffs commenced at the end of the first week in July. (July 30, 1981 transcript pp. 3-24.)

Administration of the layoff program in accordance with Massachusetts civil service law once again threatened a devastating reduction in the number of black and hispanic officers on both forces. The Police Department intended to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority. Strikingly, 54.5 percent of the department's entire complement of minority officers was to be dismissed. (Jt. App. 80-81.) The Fire Department intended to lay off 207 officers, of whom 113 were black or hispanic. Of the firefighters to be terminated, 54.6 percent were minority officers, and the layoff program threatened to eliminate 45.6 percent of all minority members of the force. (Jt. App. 43-45.)

Had the program been implemented, minority representation in both the Police and Fire Departments would have plummeted in six weeks. By mid-August only 103 of 1,660 police officers would have been black or hispanic, and minority representation in the department would have fallen from 11.7 percent to 6.2 percent. (Jt. App. 81.) By mid-August only 135 of 1,483 firefighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent. (Jt. App. 45.) In six weeks approximately half of the officers in each department hired pursuant to the district court's orders would have been terminated. Moreover, there was no certainty that additional terminations would not occur, as had been planned the preceding spring. (July 30, 1981 transcript pp. 15, 23-24.) Under these circumstances, it was apparent that the City had elected to deal with its fiscal difficulties in a manner which would preclude new hiring for an indefinite period of time and would freeze, if not further reduce, minority representation at a fraction of the level achieved during the continuing remedial phase of this litigation.

D. *The Decisions Below*

1. The District Court Decision

On July 30, 1981 the district court held a consolidated hearing on plaintiffs' motions in the two cases.[6] Modification of relief was opposed by union intervenors and state civil service officials; it was not opposed, however, by the City of Boston or its Police and Fire Commissioners.

In its August 7, 1981 opinion, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2½ amount to 'new and unforeseen conditions'." *Castro* v. *Beecher*, 522 F.Supp. 873, 877 (D.Mass. 1981) (Pet. App. A 37). The court concluded that denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress" made by blacks and hispanics in securing positions as police officers and firefighters and would produce a "grievous wrong." *Id.* at 877 (Pet. App. A 37).

The district court enjoined the Police and Fire Commissioners from reducing, pursuant to the City's reduction in force program, the percentage of minority officers obtaining at the commencement of the program; the court did not, however, order the termination or replacement of any personnel. *Id.* at 877-79 (Pet. App. A 28-29; Pol. App. 2a-3a). The court's orders had limited impact on the Massachusetts civil service statute. The court permitted unrestrained operation of the statute until it would produce a reduction in minority representation. Thereafter the court's orders required layoffs according to separate minority and non-minority personnel lists in order to maintain current minority representation. Statutory priorities and preferences, relating to both termination and rehiring, remained operable within each list.

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[6] The cases were consolidated for hearing before the chief judge of the district court due to illness of the district judge to whom the fire case had been assigned. At the hearing, written stipulations were handed up to the court and oral stipulations were entered into. Argument followed.

2. The Court Of Appeals Decision

In affirming the district court, the court of appeals first concluded that the district court had the power to modify its prior remedial orders. The court of appeals observed that these cases involve "shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees" — namely, "gross discriminatory underrepresentation" of racial minorities in the police and fire departments. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 679 F.2d 965, 972 (1st Cir. 1982) (Pet. App. A 13-14) (emphasis in original). In light of the City's reduction in force program, "there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Id.* at 972 (Pet. App. A 14-15).

Second, the court of appeals found nothing in the decisions of the Court reviewing challenges to the lawfulness of bona fide seniority systems that "precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system." *Id.* at 974 (Pet. App. A 19). The court of appeals observed that the Court has never addressed the "basic issue" presented here — namely, "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* at 974-75 (Pet. App. A 19). The court concluded that "[t]o hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted." *Id.* at 975 (Pet. App. A 19).

Finally, the court of appeals held that maintenance of the percentage representation of minorities in the police and fire departments "without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination," *id.* at 975 (Pet. App. A 20-21), did not entail unconstitutional reverse discrimination. The court noted that

it is "firmly established that remedial relief for the effects of past discrimination need not be color-blind and that the use of minority-conscious percentage goals and quotas to overcome the present and ongoing effects of past discrimination is constitutionally permissible." *Id.* at 976 (Pet. App. A 22). The "fact of past discrimination," the court reasoned, constitutes a "compelling need" for a race-conscious remedy. *Id.* at 977 (Pet. App. A 23). Weighing carefully the interests of white officers, the court of appeals concluded that the district court's order did not "unnecessarily trammel" those interests, that it served the public interest and that it was reasonable. *Id.* at 977-78 (Pet. App. A 23-26).

E. *The Political Resolution*

In the spring of 1981, promptly after plaintiffs first filed their motions, special legislation had averted Boston's proposed Police and Fire Department layoffs prior to the end of fiscal 1981. (See *supra*, p. 9.) Shortly afterward, however, negotiations among state and local officials were abandoned. These negotiations resumed one day after the district court's August 7, 1981 decision. (See, *e.g.*, *The Boston Globe*, August 10, 1981, p. 1, col. 3.) Eventually, within one month of the court of appeals decision affirming the district court's orders, a solution was found. Political dealings led to omnibus legislation, 1982 Mass. Acts c. 190, which served up a *pot pourri* of bargains and benefits — including state-guaranteed City bonding authorization to raise funds to pay court-ordered tax refunds, payment to the City of state hotel excise tax revenues generated by Boston hotels and creation of a Massachusetts Convention Center Authority, which was empowered to purchase parking and convention facilities from the City and to explore the feasibility of a new indoor sports arena to be constructed in the City.

The 1982 statute also legislated a resolution of Boston's Police and Fire Department layoffs. The act provides that the Police

and Fire Departments shall reinstate any uniformed officer who was in service, on leave or temporarily suspended as of July 1, 1981, at the outset of the layoff program. 1982 Mass. Acts c. 190, § 25.[7] The act further provides that for the 1982 and 1983 fiscal years the City shall maintain in each department no fewer uniformed employees than were in service on March 24, 1982 plus the number of officers reinstated pursuant to the act. *Id.* The statute also specially modified the operation of the Massachusetts civil service statute by providing that the City shall not terminate or otherwise separate any reinstated officer "in the future for lack of funds." *Id.* The statute thus effected a fundamental modification of seniority rights of Boston police officers and firefighters; indeed it accorded reinstated personnel a kind of superseniority, granting unique job security which is both permanent and paramount to all other statutory priorities and preferences.

Following enactment of the legislation, the Police and Fire Departments reinstated, or offered to reinstate, all personnel terminated during the City's 1981 reduction in force program. (Petition for Writ of Certiorari of Boston Firefighters Union, Local 718 p. 8.) Moreover, in spite of its once asserted crisis, the City has resumed hiring new recruits in each department. (See, *e.g.*, *The Boston Globe*, November 5, 1982, p. 17.)

Summary Of Argument

These cases are moot. Subsequent to the decision of the court of appeals, the Massachusetts legislature enacted a statute which mandated the recall of all police officers and firefighters whose layoffs were affected by the district court's orders. The statute also accorded those officers unqualified job security against layoff for lack of funds in the future. The controversy between the parties is no longer live, and the Court

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[7] A copy of Section 25 is reproduced in Appendix A to this brief.

cannot provide any relief not already accorded by the statute. The district court's orders have no permanent effect, and there is no likelihood that the controversy will recur or that any decision in connection with future proceedings will evade review.

Reaching the merits of the case, the decision below should be affirmed. These are cases of adjudicated race discrimination, which had historically excluded racial minorities from Boston's Police and Fire Departments. The remedial process established by the lower courts was designed to eradicate the effects of the exclusion. This objective was mandated by both the Fourteenth Amendment and the statutes enforcing it. Although the remedial process was incomplete, the City's reduction in force program threatened to lay off, in accordance with the seniority provisions of the Massachusetts civil service statute, approximately one-half of all minority officers hired pursuant to prior decrees. The district court had the power to modify its prior decrees to prohibit this result and to enjoin the planned reduction in current minority representation. Such modification was necessary to prevent the frustration of the ongoing remedial process.

The district court's modification of remedial measures in these cases was a matter peculiarly within its discretion, and its judgment should be accorded deference by the Court. The district court was in the best position to consider the effects of the proposed layoff program on the ongoing remedial process. The district court had the benefit of familiarity with the history of these proceedings, local social and political conditions and the absence of alternative measures. The district court exercised its discretion soundly by issuing orders of limited scope. The orders had temporary effect, limited only to the emergency at hand; they preserved as fully as possible the workings of the Massachusetts seniority statute; they did not require non-minorities to bear the full brunt of the layoff program or deprive non-minorities of opportunity for recall without loss of former rank; and they served the compelling public interest of eliminating racial exclusivity in the composition of Boston's Police and Fire Departments.

The district court's orders were not barred by other principles of law. The orders were not invalid as unconstitutional "reverse discrimination" because they were essential to effective remediation of race discrimination already adjudicated. They were necessary to achieve a compelling governmental interest. The court's orders imported no stigma on non-minorities and did not unnecessarily trammel their interests. The provisions and policies of Title VII, likewise, erect no bar to the relief ordered, for these cases entail claims of constitutional violation, and the relief available to remedy a constitutional violation is not limited by any remedial restraint reflected in Title VII. The district court's orders also permissibly superseded operation of the Massachusetts civil service statute even though the statute itself is not unlawful. The court's orders were necessary to effectuate a remedial process based upon liability otherwise established, and the validity of the seniority statute does not permit its operation to impede a necessary judicial remedy.

The district court's orders were proper remedies under Title VII. Title VII has among its objectives the elimination of the effects of past denial of equal employment opportunity. This has been consistently held by the federal courts to require remedial measures that are not limited to placing individual victims in their rightful place, and this interpretation by the courts of their remedial power was approved by Congress when it enacted the Equal Employment Opportunity Act of 1972. The approach, moreover, is particularly appropriate when implementing a remedy for exclusion of racial minorities from public employment. Where an entire racial group has been systematically excluded from employment, the victims of discrimination are not limited to those who applied and were rejected. To provide complete relief, courts must have the power, carefully exercised, to implement non-victim specific relief. Likewise, they must have the power, as here, to use such relief in order to prevent the frustration of an ongoing remedial process.

Section 703(h) of Title VII does not bar the modified relief ordered here. Liability having been established independently of operation of the Massachusetts civil service seniority system, Section 703(h) in no way limits or qualifies relief otherwise appropriate. Seniority should not singlehandedly override all other factors properly considered by the court in effectuating the remediation of proven race discrimination. Civil service seniority expectations are not vested rights; they are defeasible and modifiable; they are but one policy of the state statute itself. The district court's orders did not significantly impair the principal purposes served by seniority systems. They did, however, serve a policy of highest national priority by preventing the frustration of the ongoing remedial process.

Finally, the district court's orders were not barred by the Tenth Amendment. These are cases brought under the Fourteenth Amendment and statutes enforcing it. These laws restrict state power, and the Tenth Amendment, accordingly, does not limit their remedial scope.

Argument

I. The Standard Of Review Is Abuse Of Discretion

These cases involve district court modification of equitable relief. The district court has inherent power to modify ongoing relief to adapt to new or changed circumstances. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright*, 364 U.S. 642, 647-48 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . . The result is all one whether the decree has been entered after litigation or by consent." *Id.* at 114.

Appellate review is limited to determining whether the district court abused its discretion. *Brotherhood of Loco-*

motive Engineers v. *Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 535 (1960); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 446 (1975) (Rehnquist, J., concurring). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973); *accord Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *International Salt Co.* v. *United States*, 332 U.S. 392, 400-01 (1947). Subsequent modification of such relief requires perforce wide discretion. *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright, supra*, 364 U.S. at 647-48. Appellate review of any order under Fed.R.Civ.P. 60(b) is similarly limited. *Browder* v. *Director, Ill. Dept. of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Appellate review of equitable remedies also requires deference to the judgment of the district court. It is the district judge who applies controlling principles of law with the benefit of intimate familiarity with local concerns, conditions and developments. *E.g.*, *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 779-80 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed., supra*, 402 U.S. at 12. District judges are "uniquely situated . . . to appraise the societal forces at work in the communities where they sit." *Columbus Bd. of Ed.* v. *Penick*, 443 U.S. 449, 470 (1979) (Stewart, J., concurring). It is the district judge also who has the experience of having managed the litigation in the past. See, *e.g.*, *Brown* v. *Board of Ed.*, 349 U.S. 294, 299 (1955).

The district court's exercise of discretion must apply correct principles of law, and equity may not vary like "the Chancellor's Foot." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 416-17. However, rules of law governing the remediation of race discrimination should not be rigid. Equity requires a sensitive weighing of practicalities and balancing of public and private interests. As the Court has often noted:

> In constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'

Lemon v. *Kurtzman, supra*, 411 U.S. at 200. District courts must be left with flexibility to address the varied situations which they confront. They must not be deprived of the capacity to employ practical wisdom in fashioning remedies.

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Swann v. *Charlotte-Mecklenburg Bd. of Ed., supra*, 402 U.S. at 15, quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944).

II. The District Court's Orders Were Appropriate Measures Within An Ongoing, Yet Incomplete, Remedial Program Based Upon Findings Of Unconstitutional Exclusion Of Blacks And Hispanics From Boston's Police And Fire Departments

A. *The District Court Properly Acted In The Context Of Continuing Correction Of A Condition Created By Racial Discrimination*

These are cases of unconstitutional exclusion of racial minorities from Boston's Police and Fire Departments. Plain-

tiffs have not pursued individual tort claims; rather, they originally challenged long standing governmental practices of race discrimination and recently sought modification of relief in order to prevent the frustration and eradication of an ongoing remedy. Violations of constitutional right having been found, the powers of the district court to afford a remedy are broad. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15. *Accord Louisiana* v. *United States*, 380 U.S. 145, 154 (1968).

Where race discrimination by the state is concerned, the federal court should remedy "the condition that offends the constitution," *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15-16, as well as the condition found to "flow from such a violation." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977). When institutions of government are found to bear the imprint of race discrimination, the court must take steps to eliminate "all vestiges" of the discrimination "root and branch." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 200 and n.11 (1973); *accord Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15; *Dayton Bd. of Ed.* v. *Brinkman*, 443 U.S. 526, 537 (1979). The district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, *supra*, 380 U.S. at 154.

Here, the courts had found that official practices had long excluded blacks and hispanics from Boston's Police and Fire Departments. The condition produced by these practices—"gross discriminatory underrepresentation" of racial minorities, *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13-14)—was the basis of the district court's original remedial orders. These prior remedial orders, to which all parties agreed, sought to eliminate the effects of

this past discrimination. They were framed to correct the racial exclusivity of public safety departments which past unlawful practices had brought about. Relief was to be accomplished through race-conscious affirmative measures involving priority classifications and numerical goals and through compliance measures addressed to civil service examinations, civil service certification, recruitment, physical and mental testing and the like. The parties and the court looked to these measures to effect a remedy which was "to be more than token." *Castro* v. *Beecher, supra*, 459 F.2d at 737. When the remedial target was reached and the effects of past discrimination fully eliminated, the remedial jurisdiction of the district court was to cease.

Although the district court was empowered to implement a remedy which "promises realistically to work, and promises realistically to work *now*," *United States* v. *Montgomery County Bd. of Ed.*, 395 U.S. 225, 235 (1969) (emphasis in original), quoting *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968), the court and the parties pursued a cautious remedial program which was to work over time. Its effectiveness depended upon the continuing commitment of the City to the remedial process. The original decrees were premised on an assumption that municipal hiring practices, subject to the original measures of affirmative action, would in time produce Police and Fire Departments which were free from the imprint of discrimination and which were fairly representative of a population having genuinely equal opportunity for employment. *Castro* v. *Beecher, supra*, 365 F.Supp. at 665. *Cf. International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977).

Six years of affirmative judicial relief produced progress. By the time of the proposed layoffs in 1981, however, the remedy was not complete. Blacks and hispanics remained substantially underrepresented in Boston's Police and Fire Departments. The remedial process had increased minority representation to 11.7 percent in the Police Department and to 14.7 percent in

the Fire Department, but minority representation remained far below the remedial target, and considerably below the level of minority representation in the City's population at the time of the original decrees. By 1981, the "lingering effects" of racial exclusion had not been eradicated, and the process of judicial remedy remained ongoing.

The City of Boston was obligated not to take steps which would "impede the process" of eradicating these effects of past discrimination. *Dayton Bd. of Ed.* v. *Brinkman, supra*, 443 U.S. at 538. Following judicial findings that discrimination had established a system of racial exclusion from Boston's public safety forces, both the state and its municipal subdivision were under "a continuing duty to eradicate the effects of that system." *Columbus Bd. of Ed.* v. *Penick, supra*, 443 U.S. at 458. Since the remedy was incomplete, the district court properly took into account the impact of the City's 1981 proposed layoffs on the ongoing remedial process. As the Court stated in a similar setting involving school desegregation: "such a proposal must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 460 (1972).

The City's decision to impose massive reductions in Police and Fire Department personnel would have dramatically impeded the remedial process. No less than 57 percent of the minority police officers and 45 percent of the minority firefighters appointed during the continuing remedial phase of the litigation were to be discharged. Minority representation in the Police Department would drop from 11.7 percent to 6.2 percent, from 39 percent of the remedial target to 21 percent of that target. Minority representation in the Fire Department would drop from 14.7 percent to 9.1 percent, from 49 percent of the remedial target to 30 percent of the target. The City's program of layoffs would also, for all intents and pur-

poses, have eliminated the remedial mechanism. It would have placed the agreed upon remedial target practically out of reach. Unless it took action, the district court was faced, at the very least, with the possibility of extended supervision of relief. Indeed, given the apparent elimination of recruitment and hiring for some time to come, the district court faced the prospect that its remedial measures would atrophy. Surely the district court was not bound to let the City interfere with the remedial program and the accomplishment of the yet unattained objective. The City's reduction in force program "was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered." *Id.* at 470. Modification of prior relief was warranted, for an equitable remedy may be modified in order to achieve its original purpose. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *United States* v. *United Shoe Mach. Corp.*, *supra*, 391 U.S. at 249, 251-52; *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942); *Brown* v. *Neeb*, 644 F.2d 551, 560, 565 (6th Cir. 1981); *Equal Employment Opportunity Comm'n* v. *United Ass'n of Journeymen and Apprentices*, 438 F.2d 408, 414 (6th Cir.), *cert. denied*, 404 U.S. 832 (1971); *Evans* v. *Buchanan*, 512 F.Supp. 839, 849 (D.Del. 1981); see *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 918 (6th Cir. 1979).

Modification of the district court's prior decrees was necessary simply to prevent the substantial eradication of the partial remedy which had been accomplished to date. *Brown* v. *Neeb*, *supra*, 644 F.2d at 560; *Perrotte* v. *Percy*, 489 F.Supp. 212, 214 (E.D.Wis. 1980); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370, 372 (E.D.Pa. 1976); *cf. Exxon Corp.* v. *Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980). The massive reductions in force in the Police and Fire Departments threatened to "seal into permanent existence the injustices of the past." *United States* v. *Louisiana*, 225 F.Supp. 353, 393 (E.D.La. 1963), *aff'd*, 380 U.S. 145 (1965). Permitting the City to address its financial problems

by laying off one-half its minority police officers and firefighters would permit it to withdraw the remedy and to "freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971).

The district court ruled that further action was necessary to prevent a "grievous wrong"—that is, "the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire department since 1970." 522 F.Supp. at 877 (Pet.App. A 37). The court of appeals agreed, 679 F.2d at 972 (Pet.App. A 14-15):

> there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees.

The courts below "[took] into account the particularities of the situation" and fulfilled their obligation to take "all reasonable methods . . . available to formulate an effective remedy." *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976), quoting *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) and *North Carolina Bd. of Ed.* v. *Swann*, 402 U.S. 43, 46 (1971).

B. *Proper Remedy For Unconstitutional Exclusion Of Racial Minorities From Government Service Is Not Confined To Relief For Individual Victims*

Plaintiffs did not sue a private employer, and they did not sue simply to secure individual employment. These are suits to eliminate the consequences, as well as the practices, of unconstitutional exclusion of racial minorities from the police and fire departments of a major city with a large, and growing,

minority population. Until the consequences of the discrimination are corrected, two of Boston's most visible institutions of government bear publicly the mark of official race discrimination.

The institutions of the state cannot be permitted to stand in a form fashioned by race discrimination. For government to manifest itself as the product of past discrimination offends the Fourteenth Amendment. The state cannot bring itself into constitutional compliance "simply by ending its unlawful acts and adopting a neutral stance." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall and Blackmun, JJ.). Affirmative steps must be taken so that the effects of past discrimination are "eliminated root and branch." *Green* v. *County School Bd.*, *supra*, 391 U.S. at 438.

The institutions of government both reflect and influence the values of the community. They can announce a commitment to equality of opportunity, access and service, or, by remaining in a form and structure fashioned by past discrimination, they can sanction the stigma of racial exclusion. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 26; *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954). Government can be of the people or not.

> From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S.Rep. No. 415, 92d Cong., 1st Sess., reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, p. 419 (1972).

Petitioners' argument that race discrimination which is institutionalized in the fabric of public employment may be remedied by individualized relief alone, confines the compass of constitutional remedy far too narrowly. The "nature and scope of the constitutional violation," *Milliken* v. *Bradley*, *supra*, 433 U.S. at 280, broadens the expanse, as well as sets the limit, of appropriate remedy. A decree which is "aptly tailored to remedy the consequences of the constitutional violation" does not exceed the scope of the violation. *Id.* at 287.

Race discrimination in public employment, in particular, is institutionalized; it is, unfortunately, neither individualized nor isolated. See H.R.Rep. No. 238, 92d Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News 2152. Where race discrimination has shaped the personality of government, relief must correct the distortion of institutional character.

Just as the district court must do more than bar future wrong, it must recognize that the "effects" of discrimination are not merely matters of ascertainable individual injury. Where long settled practices have excluded racial minorities from government employment, it is not just that identifiable members of a discrete set have been discouraged from seeking to advance their position. It is, rather, that an entire segment of the population, defined by color of skin, never sought, or thought, to volunteer for victimization by the state. *Cf. Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 363-67; *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327, 331, *cert. denied*, 406 U.S. 950 (1972).

The federal courts have recognized that, where the shape and workings of government are involved, remediation of un-

constitutional race discrimination is not bounded by tort law doctrines confining relief to compensation only to, and only to the extent proved by, specific individual victims. A race-conscious remedy "that aids persons perceived as members of relatively victimized groups" is proper if predicated upon judicial findings of constitutional violation. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 307 (opinion of Powell, J.); *accord id.* at 325 (opinion of Brennan, White, Marshall and Blackmun, JJ.). "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. Here, moreover, the remedy is not premised upon assumptions of generalized, or "societal," discrimination. Compare, *e.g.*, *id.* at 305-06, 309 (Powell, J.). Here, race discrimination has been adjudicated, and Boston's Police and Fire Departments themselves have been found to reflect "gross discriminatory underrepresentation" of blacks and hispanics. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13-14).

Similarly, where past discrimination has excluded racial minorities from effective resort to voting franchise, remedial measures have extended to all members of the racial class without requirements of proof of individual victimization. *E.g.*, *Louisiana* v. *United States*, *supra*, 380 U.S. at 155; *United States* v. *Lynd*, 349 F.2d 785, 787-88 (5th Cir. 1965); *United States* v. *Ward*, 349 F.2d 795, 805-06, *modified*, 352 F.2d 329 (5th Cir. 1965); *United States* v. *Mississippi*, 339 F.2d 679, 685 (5th Cir. 1964). Where discrimination in institutions of government is against an entire racial group, a carefully crafted remedy should be permitted to afford the victimized group the opportunity to achieve the position it would likely have achieved but for the discrimination. United States Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 39-40 (1981) (U.S.

Comm'n on Civ. Rts.); Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 Harv.C.R.-C.L. L. Rev. 503, 512-13 (1982) (Duncan).

The challenge raised by petitioners to any relief which is not grounded on individualized proof of victimization and individualized proof of "rightful place" is indeed radical. It assaults a decade of effort by the lower federal courts to deal with the intractable problems of remedying governmental race discrimination. Discriminatory exclusion of racial minorities from the nation's police and fire departments has been nearly universal. (See *infra*, Appendices B and C.) The federal courts have consistently found it necessary, in order to eradicate the present effects of past discrimination, to employ remedial measures which benefit members of racial groups long excluded from police and fire forces, without requiring demonstration of individual victimization. *E.g.*, Second Circuit: *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 279-87 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1611 (1982); *United States* v. *City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Comm'n*, 490 F.2d 387, 398-99 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civ. Serv. Comm'n*, 482 F.2d 1333, 1340-41 (2d Cir. 1973); Third Circuit: *Erie Human Relations Comm'n* v. *Tullio*, 493 F.2d 371, 374-75 (3rd Cir. 1974); *Commonwealth of Pa.* v. *O'Neil*, 473 F.2d 1029, 1030 (3rd Cir. 1973) (en banc); Fifth Circuit: *NAACP* v. *Allen*, 493 F.2d 614, 617-20 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053, 1055-56 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974); Seventh Circuit: *United States* v. *City of Chicago*, 549 F.2d 415, 436 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469, 476 (1980); Eighth Circuit: *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 588 F.2d 235, 240-41 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); *Carter* v. *Gallagher*,

supra, 452 F.2d 328-29, 331; Ninth Circuit: *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1342-43 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). These are the courts which have found, over and over, violations of the constitutional prohibition of race discrimination. These are the courts which have had "to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 6. In announcing the "large constitutional principles" which must inform the practical remedies administered by the lower courts, this Court "must take into account their experience." *Id.*

C. *The District Court's Orders Were Limited In Scope, Took Competing Private Interests Into Account And Served The Public Interest*

The district court's orders reflect the weighing of practicalities and balancing of public and private interests which are the hallmarks of equity. They did not excessively intrude upon either the interests of the state or the interests of non-minority officers.

The orders were temporary maintenance orders, preserving the status quo in the face of a particular threatened exigency. The orders were addressed to the City's 1981 reduction in force program only; they did not require the permanent maintenance of minimum minority representation. Compare *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 24-25. The argument based upon the asserted permanence of the district court's orders (Brief for Boston Firefighters Union p. 25, 28 n.9; Brief for the United States as Amicus Curiae at p. 9 n.8; Brief for Anti-Defamation League as Amicus Curiae p. 8) disregards their plain language. A decree is to be read in light of what it provides, *Swift & Co.* v. *United States*, 276 U.S. 311, 328 (1928); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 126 (1948), and the district court's orders make

no provision for permanent restraint. Indeed, they recite as their sole basis the City's current layoff program—namely, "the effective and proposed reductions in force." *Castro* v. *Beecher, supra*, 522 F.Supp. at 877 (Pet.App. A 28). "The language of an injunction must be read in the light of the circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States* v. *Christie Industries, Inc.*, 465 F.2d 1002, 1007 (3rd Cir. 1972). *Accord Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912); *Swift & Co.* v. *United States, supra*, 276 U.S. at 328. Relief was sought here from the threatened effects of particular government action; it was neither requested nor justified as a matter of permanent right or permanent remedy. Permanence, in fact, is at odds with the entire remedial process, which contemplates eventual termination, without revival, of the district court's jurisdiction.

The district court's orders also served limited purposes. They prohibited reduction of minority representation due to the 1981 layoff program, but they did not bar any reduction in minority representation arising from other causes, including retirement, discipline, future personnel programs and the like. The orders did not bar the layoff of all minority officers. They did not require an increase in minority representation. They did not advance the original affirmative relief agreed to by the parties.

The orders did not require that white officers be replaced by new minority hires. *Tangren* v. *Wachenhut Services, Inc.*, 480 F.Supp. 539, 549 (D.Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1772 (1982); *Sisco* v. *J.S. Alberici Construction Co., Inc.*, 655 F.2d 146, 149 (8th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1485 (1982). They certainly did not, as the Unions inaccurately suggest (Brief for Boston Firefighters Union p. 25; Brief for Boston Police Patrolmen's Union p. 25), require the termination of any officer, white or minority. It was the City

which chose to lay off police and fire officers, and it was the City which determined the magnitude of the program. If the layoffs affected white police officers hired prior to implementation of the court's original remedial measures (See Jt.App. 90; Brief for United States as Amicus Curiae p. 8 n.7), this was due to the magnitude of layoffs set by the City, to the refusal of state and municipal officals to devise alternative fiscal measures and to the civil service preference for disabled veterans, which operated to the advantage of approximately 63 otherwise junior officers (see *infra*, p. 60 and n.12).

The district court paid respect to seniority rights and other statutory preferences to the maximum extent possible. The orders permitted the City to terminate officers according to statutory priorities until the layoffs threatened the percentage of racial minorities obtaining at the outset of the program. If the City chose to lay off further officers, separate seniority lists were to be used, but seniority rankings and all preferences, governing both order of separation and order of possible recall, were to be applied within each list. *Castro* v. *Beecher*, *supra*, 522 F.Supp. at 878-79 (Pet.App. A 28-29; Pol.App. 2a-3a).

Additionally, the district court's orders did not overbear "the interests of the state and local authorities in managing their own affairs." *Milliken* v. *Bradley*, *supra*, 433 U.S. at 281. The court neither prohibited reductions in force nor prescribed staffing levels. When, in light of the questionable budgetary assumptions upon which the reduction in force program had been based, the court was invited to enjoin temporarily all layoffs pending resumption and resolution of political negotiations affecting the City's finances, it refused. (July 30, 1981 transcript p. 34-7; Fire App. 203-04). The court left the stalled political process to the politicians and took no steps to dictate solutions or limit options. See *Brown* v. *Neeb*, *supra*, 644 F.2d at 563. The court mandated no expenditure of public funds. The court did nothing to intrude upon the operations of either public safety department. Sig-

nificantly, the Police Commissioner and the Fire Commissioner did not oppose the relief sought. Nor did they appeal. *Cf. Hutto* v. *Finney*, 437 U.S. 678, 688 (1978).

The chief judge of the district court had the benefit of six years' experience with this case. He was familiar with both the background of ongoing relief and the current context of the City's reduction in force program. The weighing of relevant factors to determine their effect upon the process of remediation is "a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge." *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 466. As in the past, *e.g.*, *Castro* v. *Beecher*, *supra*, 386 F.Supp. at 1284-85, the district court remained sensitive to the limitations upon the powers of the federal court. (See July 30, 1981 transcript pp. 25-27, 35-37). For these reasons his exercise of discretion is entitled to "special deference." *Hutto* v. *Finney*, *supra*, 437 U.S. at 688.

Equity in the end must serve the public weal, and a court of equity must weigh public as well private interests. These cases do not simply pose a competition between private interests. The public interest is deeply involved. Police officers and firefighters have special roles in our urban society. They are uniformed; they are visible; they have power over life and death. The services they perform are exceedingly broad. These are the servants of the state on whom the public looks to "create and maintain a feeling of security in the community." American Bar Assn., *Standards Relating to the Urban Police Function*, p. 4 (1973). See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report*: *The Police*, p. 144 (1967).

Police officers and firefighters in Boston, as in other major cities, must perform their difficult and diverse tasks for a racially mixed population. Indeed, they must perform them for a rapidly growing minority community. Public safety officers must be able to communicate with and enjoy the confidence of the community they serve. Public safety cannot be

achieved by departments reflecting racial exclusiveness. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, p. 107 n.1 (1967); National Commission on the Causes and Prevention of Violence, *To Establish Justice and Insure Domestic Tranquility*, p. 24 (1970); National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime*, p. 75 (1973). Public safety is endangered, and violence and unrest are fostered, by racial exclusion. This lesson has surely been taught by our national history of civil strife. It has been confirmed by virtually every modern study of race riots and law enforcement. See, *e.g.*, National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders*, pp. 299-300, 315 (1968); National Commission on the Causes and Prevention of Violence, *Violence in America*, p. 414 (1969); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Disorders and Terrorism*, p. 125 (1976).

In Boston, governmental practices have long excluded racial minorities from the most visible of public institutions. To public perception, the Boston Police and Fire Departments have long worn, and continue to wear, the badge of discrimination—the mark of racial exclusion. Until that badge is discarded, the City's public safety departments cannot adequately perform their task. This the courts below recognized and properly took into account. See *Boston Chapter NAACP, Inc.* v. *Beecher, supra*, 679 F.2d at 977-78 (Pet.App. A24-25). So, too, have other lower courts when seeking to remedy, in practical and effective terms, past discriminatory exclusion of racial minorities from police and fire departments. See, *e.g.*, *Talbert* v. *Richmond*, 648 F.2d 925, 928, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *NAACP* v. *Allen, supra*, 493 F.2d at 621; *Bridgeport Guardians, Inc.* v. *Members of the Bridge-*

port Civ. Serv. Comm'n, supra, 482 F.2d at 1341; *Erie Human Relations Comm'n* v. *Tullio,* 360 F.Supp. 628, 630 (W.D.Pa. 1973); *Van Aken* v. *Young,* 541 F.Supp. 448, 469 (E.D.Mich. 1982); *Arnold* v. *Ballard,* 390 F.Supp. 723, 736 (N.D. Ohio 1975).

D. *The District Court's Orders Did Not Entail Unconstitutional Reverse Discrimination*

In prohibiting the City from reducing the current minority representation in its Police and Fire Departments, the district court ordered race-conscious relief. The recent decrees were entered in order to prevent the City's layoff program from frustrating and substantially eradicating an ongoing process of remediation. That remedial process had long been in place. It had the agreement, and depended upon the continuing commitment, of the parties; it had been ordered, and repeatedly reaffirmed, by the court. The entire remedial process was based upon the adjudication of discriminatory exclusion of blacks and hispanics from the City's Police and Fire Departments. The fact that the recent orders, and the prior orders, mandated race-conscious relief does not violate any right of non-minority officers to equal protection of the laww The orders served a compelling governmental interest and were necessary to its accomplishment.

The Court has by now established that race-conscious remedial measures are not unconstitutional when necessary to achieve a "compelling governmental interest." *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 299 (Powell, J.). See *Fullilove* v. *Klutznick,* 448 U.S. 448, 497-99 (1980) (Powell, J. concurring). Indeed, four members of the Court have concluded that race-conscious measures are lawful when they meet a lesser standard—that is, when they serve "important governmental objectives" and are "substantially related to the achievement of those objectives." *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 359

(Brennan, White, Marshall and Blackmun, JJ.). See *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 517-20 (Marshall, Brennan and Blackmun, JJ.). The August 7, 1981 orders of the district court meet both of these standards, for judicial remediation of the effects of race discrimination constitutes a compelling governmental interest. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 300-02, 307-09 (Powell, J.); see *id.* at 362-64 (Brennan, White, Marshall and Blackmun, JJ.); *North Carolina Bd. of Ed.* v. *Swann*, *supra*, 402 U.S. at 45-6. The court of appeals expressly found that the past discrimination constituted "a 'compelling need' for a minority-conscious remedy." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 977. (Pet.App. A23). As Justice Blackmun has observed: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 407.

Importantly, these cases involve judicial findings of race discrimination. The courts below were competent to make those findings. See *id.* at 300-02, 307-09 (Powell, J.). Indeed, they were findings which courts are especially competent to make, for they related to specific practices which had resulted in the systematic exclusion of blacks and hispanics from the particular municipal agencies affected by the district court's orders. The district court's orders did not rest on a mere presumption of generalized or "societal" discrimination. See *id.* at 307 (Powell, J.); compare *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 302-07 (Powell, J., concurring) (societal discrimination proper area for congressional findings).

Disadvantage to non-minority officers cannot bar judicial relief. Where liability has been established, relief is warranted. "After such findings have been made, the governmental interest in preferring members of the injured groups at

the expense of others is substantial, since the legal rights of the victims must be vindicated." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 307 (Powell, J.). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 484 (Burger, C.J., White and Powell, JJ.), quoting *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 777. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 366 n.41 (Brennan, White, Marshall and Blackmun, JJ.); *Detroit Police Officers' Ass'n* v. *Young*, *supra*, 608 F.2d at 696. This is true whether the remedy addresses a constitutional violation or a statutory violation. See *Regents of the University of California* v. *Bakke*, *supra*, 448 U.S. at 300-02, 304-09 (Powell, J.). Indeed the principle underlies much of the remedial efficacy of Title VII itself. See, *e.g.*, *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 774-75, 777-78 (burden on "innocent" parties proper in implementing Title VII remedy); *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, 556 F.2d 167, 179-80 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (same).

> An inevitable consequence of a court order which requires that more jobs be given to blacks than was previously the case, particularly where the total number of jobs actually available is on the decline, will be that fewer whites will be employed. However, compliance with the [Civil Rights] Act will frequently require that result.
>
> I am unwilling to concede that the court created the problem. On the contrary, the problem was created by the discriminatory action of the employers and/or the union. A court should respond by taking steps necessary to both undo the effects of past discrimination and also to prevent its future practice.

Vogler v. *McCarty*, 451 F.2d 1236, 1239 (5th Cir. 1971) (Clark, J. dissenting on other grounds).

The race classification reflected in the district court's August 7, 1981 orders imported no stigma. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 325 (Brennan, White, Marshall and Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 165 (1977) (White, Stevens and Rehnquist, JJ.). There was no judicial oppression of a "discrete and insular minority." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The classification did not arise from any invidious purpose. Rather, it was the necessary consequence of judicial effort to prevent the frustration of the ongoing remedial process.

By setting minimum minority representation to be maintained during the course of the City's reduction in force program, the decrees altered the order of layoffs prescribed by statute. Some non-minority officers risked layoff who otherwise would have retained their jobs; some black and hispanic officers similarly would retain positions they otherwise would have lost. The means employed by the district court, however, were necessary to the achievement of its proper ends.

Massive terminations of minority officers would frustrate the court's established remedial process, and layoffs in accordance with strict seniority would produce this result. The district court, thus, had no choice but to supersede the statute. No efficacious alternative was available. See *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 510 (Powell, J.); *NAACP* v. *Allen*, *supra*, 493 F.2d at 619. It was not for the court to order job-sharing, early retirement, pay reduction or other measures within the ambit of labor negotiation or management prerogative. The court's capacity and function made the level of minority representation the only appropriate issue for its consideration. That the representation levels ordered were specific was a necessary feature of any judicial effort to prevent the frustration of the remedial process. The district court had to issue an order with specificity to permit compliance,

and the statutory scheme had no flexibility itself. The court, therefore, could not have ordered the Police and Fire Departments merely to take race into consideration as one relevant factor in implementing the layoff program. Compare *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 315-19 (Powell, J.). The objective of the remedial process was far from achieved, and it cannot be said that representation levels of 11.7 percent and 14.7 percent overreach a fair level of minority presence in the police and fire departments of a city with a minority population of almost 30 percent. See *Fullilove* v. *Klutznick*, 448 U.S. at 510 (Powell, J.).

The court's orders did not "unnecessarily trammel" the interests of non-minority officers and did not constitute an "absolute bar to advancement." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979). Minority officers as well as non-minorities were left subject to layoff; all terminated officers were eligible for recall without loss of their original seniority rank for purposes of benefits, promotion and the like; and, in any event, the Police and Fire Departments remained overwhelmingly white. Finally, the orders were temporary. *Id.* They addressed the program of layoffs implemented in mid-1981; their reach extended no further.

E. *A Remedial Order May Supersede Otherwise Valid State Law In Order To Be Effective*

The district court was not required to find the seniority provisions of the Massachusetts civil service statute invalid, as a matter of substantive law, in order to modify its application. The remedial power of federal courts extends to setting aside otherwise valid state law when necessary to provide an effective remedy. This view of the permissible scope of remedial measures has been recognized by the Court. See, *e.g.*, *Louisiana* v. *United States*, *supra*, 380 U.S. at 154; *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 459-60. And the rule is well-settled. See, *e.g.*, *United States* v.

Mississippi, supra, 339 F.2d at 684-85; *United States* v. *Duke*, 332 F.2d 759, 767-69 (5th Cir. 1963). Indeed, the court of appeals relied upon the principle, when it noted that "remedies to right the wrong of past discrimination may suspend valid state laws." *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, 679 F.2d at 975 (Pet.App. A20).

The lower federal courts which have assumed the specific task of remedying past exclusion of racial minorities from police and fire departments have consistently issued orders superseding the operation of otherwise valid civil service statutes, municipal ordinances, departmental regulations and other provisions of state law. *E.g.*, *Sarabia* v. *Toledo Police Patrolman's Ass'n, supra*, 601 F.2d at 918 (6th Cir. 1979); *United States* v. *City of Chicago, supra*, 549 F.2d at 438; *United States* v. *City of St. Louis*, 410 F.Supp. 948, *amended*, 418 F.Supp. 383, 386 (E.D.Mo. 1976), *aff'd in relevant part sub nom., Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F.2d 506 (8th Cir. 1977) (consent decree), *cert. denied*, 434 U.S. 819 (1977); *Erie Human Relations Comm'n* v. *Tullio, supra*, 357 F.Supp. at 425; *Carter* v. *Gallagher, supra*, 452 F.2d at 319, 328; *Glass City Black Brothers United* v. *Neeb*, 540 F.Supp. 852, 855 (N.D.Ohio 1982); *Prate* v. *Freedman*, 430 F.Supp. 1373, 1375 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *Dozier* v. *Chupka*, 395 F.Supp. 836, 860 (S.D.Ohio 1975); *Sheild Club* v. *City of Cleveland*, 370 F.Supp. 251, 256 (N.D.Ohio 1972); *See generally* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv.L.Rev. 1544, 1557-60 (1975) (Note, *Last Hired*).

The justification for the measure lies in its necessity. "Local restrictions must of course give way to orders necessary to make effective this court's decree." *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civ. Serv. Comm'n*, 354 F.Supp. 778, 798 (D.Conn. 1973), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973). Similarly, where state laws interfere with continuing relief during the remedial phase of a

case, modification of remedy is in order. As the court put it in *Coffey* v. *Braddy*, 372 F.Supp. 116 (M.D.Fla. 1971), state law "now must be expressly suspended in order to maintain the integrity and vitality of that earlier order." *Id.* at 122.

F. *Washington v. Davis Did Not Limit The Power Of The District Court To Modify Its Prior Remedial Orders*

Both the police case and the fire case involved findings of unconstitutional race discrimination, although in neither case did the district court find purposeful discrimination. Judgment was entered in the police case in 1971 and affirmed on appeal one year later. Judgment was entered in the fire case in 1974 and affirmed the same year. In 1976 the Court decided *Washington* v. *Davis*, 426 U.S. 229 (1976), holding that to establish race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must prove racially discriminatory purpose. This intervening decision did not limit the district court's power to modify its prior remedial orders.

The issue now under review is the appropriateness of a remedial order. Securing relief is not the same as establishing liability, and judgment having already entered, plaintiffs need not have re-established their right to relief. *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright*, *supra*, 364 U.S. at 647; *Sarabia* v. *Toledo Police Patrolman's Ass'n*, *supra*, 601 F.2d at 919.

The argument based on *Washington* v. *Davis* is at best an argument for relief from the original judgment, and at worst a collateral attack upon that judgment. See *Dennison* v. *Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Smith* v. *Missouri Pacific R.R. Co.*, 615 F.2d 683, 684-85 (5th Cir. 1980); *Prate* v. *Freedman*, *supra*, 430 F.Supp. at 1375. And, not having appealed from the original judgments on the basis of lack of

discriminatory purpose, see *Castro* v. *Beecher, supra*, 459 F.2d 725; *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, 504 F.2d 1017, the issue is not available to petitioners in opposing modification of relief later. Compare *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424, 432 (1976). Indeed, the state defendants should be estopped from asserting this challenge due to their repeated entry into remedial consent orders subsequent to *Washington* v. *Davis*. (See, *e.g.*, Jt.App. 32-34, 35, 64-69, 70-77.) See *Sarabia* v. *Toledo Police Patrolman's Ass'n, supra*, 601 F.2d at 919.

Moreover, the Court's decision in *Washington* v. *Davis* does not constitute a change of law of the sort which calls into question either the original judgments of liability or their sufficiency as predicates for relief. There are two types of cases in which ongoing equitable relief may be affected by a subsequent change in law. The first involves an intervening change of law which directly addresses the permissible scope of judicial remedy itself. See *Pasadena City Bd. of Ed.* v. *Spangler, supra*, 427 U.S. at 434-35. The second occurs when continued operation of an equitable remedy works to deprive a party of a right otherwise accorded by an intervening change of substantive law. See, *e.g.*, *System Fed'n No. 91 Ry. Emp. Dept.* v. *Wright, supra*, 364 U.S. at 648; *Pennsylvania* v. *The Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421 (1855).

Washington v. *Davis* bears on the present cases in neither of these ways. It did not announce new limits upon remedial powers, and it did not confer new rights which the district court's modified remedial orders impair. *Washington* v. *Davis* only announced and clarified an essential element of the original constitutional claim. "[P]recedential evolution," however, has never been sufficient to overturn a final judgment otherwise unappealable. *Mayberry* v. *Maroney*, 558 F.2d 1159, 1164 (3rd Cir. 1977); *accord Berryhill* v. *United States*, 199 F.2d 217, 219 (6th Cir. 1952); *Lehman Co. of*

America v. *Appleton Toy & Furniture Co.*, 148 F.2d 988, 990 (7th Cir. 1945).

The state officials also argue that, in light of *Washington* v. *Davis*, modification of the prior remedial orders was beyond the "nature and extent" of the violation (Brief for State Petitioners p. 54). The officials do not, however, challenge the basis for the original relief, and purposefulness has no relevance to whether modification was required in order to prevent the eradication of ongoing relief.

Finally, the court of appeals observed that "[i]t is by no means clear that our decisions in the police and fire cases should have been different had they been decided after *Washington* v. *Davis* and *Arlington Heights*. . . ." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 971 (Pet.App. A 13). Although in its original opinions in both cases the district court recited that there had been no purposeful discrimination, intent was not a litigated issue. It was neither pleaded nor tried. *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 935 and n.4, 944; *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 519. The remarks of the district court, accordingly, were not findings. Purposefulness was never adjudicated. Yet, had intent been placed in issue, the findings of constitutional violation would likely have been the same. Purpose to discriminate may be proven by "systematic exclusion" of eligible members of the racial minority. *Washington* v. *Davis*, *supra*, 426 U.S. at 239, quoting *Akins* v. *Texas*, 325 U.S. 398, 403-04 (1945). It may be inferred from the "total or seriously disproportionate exclusion" of minorities. *Washington* v. *Davis*, *supra*, 426 U.S. at 242. The statistical disparity found by the district court in the original proceedings in these cases was "gross," *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13), and the district court found a woefully non-job-related examination whose "discriminatory consequences" were "foreseeable by sophisticated persons." *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 943. Undeniably, the City's officials were well aware of the long ex-

perience of exclusion of minorities from Boston's public safety departments.

G. *An Otherwise Appropriate Constitutional Remedy Is Not Precluded By The Provisions Or Policies Of Title VII*

Plaintiffs here sought and were afforded relief for constitutional claims, enforceable under 42 U.S.C. § 1983. Petitioners and amici argue that the district court's orders conflict with Title VII (but see *infra*, pp. 45-62). Regardless of the merit of this argument, the court's orders are appropriate constitutional remedies and stand on that independent basis. In claims of employment discrimination, Title VII does not occupy the field; it does not preclude remedies under 42 U.S.C. § 1983 which might extend beyond its own range. *Brown* v. *Neeb*, *supra*, 644 F.2d at 564; *Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 921 (3rd Cir. 1978). The arguments of amici (Brief for AFL-CIO as Amicus Curiae p. 3; Brief for the United States as Amicus Curiae p. 26) to the effect that Title VII controls the case are thus irrelevant.

Rights and remedies under Title VII are not exclusive of rights and remedies under other civil rights laws. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975). "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). Public employees, as well as those in the private sector, benefit from the breadth of available remedies.

> Although the Johnson case involved alleged discrimination by a private employer, Congress clearly expressed its intention also to allow state and local government employees to seek relief under either Title VII or the older Civil Rights Acts. Indeed, in the same House Report relied upon by the Supreme Court, the House Committee on Education and Labor stated:
>
> > In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected . . . . The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.
>
> H.R. Rep. No. 92-238, *supra*, at 18-19, U.S. Code Cong. & Admin. News 1972, 2137, 2154.

Torre v. *Barry*, 661 F.2d 1371, 1373 (D.C.Cir. 1981).

The result reflects a cardinal principle of statutory construction: "repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). It also reflects a more specific congressional policy to facilitate the remediation of race discrimination. In passing the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, Congress declared that federal policy against discrimination was to be of the "highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). To accomplish the objective, Congress enacted new measures yet preserved pre-existing remedies as well. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150-51 n.5 (1970) (Public Accommodations Title does not restrict remedy under 42 U.S.C. § 1983); *Johnson* v. *Railway Express Agency*, *supra* (Equal Employment Title does not restrict remedy under 42 U.S.C. § 1981); *Alexander* v. *Gardner-Denver Co.*, *supra* (Equal Employment Title does not supersede remedies under collective bargaining agreement); *Sullivan* v. *Little Hunting*

Park, Inc., 396 U.S. 229, 237-38 (1969) (Public Accommodations Title does not supersede § 1982). Cf. *Jones* v. *A.H. Mayer Co.*, 392 U.S. 409, 413-17 (1968) (Fair Housing Act of 1968 does not supersede 42 U.S.C. § 1982).

Indeed, the Court has frequently identified legislative history indicating that Title VII places no limit on rights and remedies otherwise available. See *Runyon* v. *McCrary*, 427 U.S. 160, 173-75 n.10 and 11 (1976); *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.9. For example, the Justice Department interpretive memorandum placed into the record by Senator Clark, one of the 1964 floor managers of the bill, states that "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." 110 Cong. Rec. 7207 (1964). And, in both 1964 and 1972 Congress rejected amendments which would have made Title VII exclusive in the area of employment discrimination and would have precluded remedies not in accord with the act. See 110 Cong. Rec. 13650-52; 118 Cong. Rec. 3368-73, 3959-65 (1972).

III. The District Court's Orders Were Proper Remedies Under Title VII

The district court's orders were appropriate remedial measures under Title VII. Although the court prohibited layoffs which would reduce current minority representation without requiring individual proof of victimization and individual proof of "rightful place," the orders properly served to prevent the City of Boston from frustrating ongoing remediation of the effects of long-practiced discrimination. The measure served the fundamental policy of Title VII and conflicted with none of its provisions.

A. *Judicial Relief Under Title VII Is Not Limited To Individual Victim "Rightful Place" Remediation*

The purpose of the act is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The statute was enacted not to meet a sudden exigency but to eradicate deeply rooted, pervasively experienced and tenaciously maintained practices of discrimination. Enforcement of the statute should "endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418, quoting *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

The remedial provisions of Title VII are contained in section 706(g), which provides, in part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. § 2000e-5(g). By this provision Congress intended to vest the federal courts with broad equitable discretion to fashion a remedy as extensive and complete as the circumstances of adjudicated discrimination require. *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 763-65 (1976); *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418-21.

Where discrimination is systematic, where it affects an entire racial group and where the effect is gross exclusion from

employment, remedial measures under Title VII may extend beyond individual victim, rightful place remediation, for a fundamental objective of Title VII is eradication of the effects of past discrimination. Having found a violation of the statute, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418, quoting *Louisiana* v. *United States, supra*, 380 U.S. at 154; *United States* v. *United Brotherhood of Carpenters & J., Loc. 169*, 457 F.2d 210, 216 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

> But where the imbalance is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and the ratio of minority members enjoying such rights would be higher. . . . The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential.

Rios v. *Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 631 (2d Cir. 1974).

To accomplish the remedial objectives of Title VII, the lower courts have repeatedly turned to remedies which are not victim specific. They have done so in cases involving exclusion of racial minorities from police and fire forces. See, *e.g.*, *Ass'n Against Discrimination* v. *City of Bridgeport, supra*, 647 F.2d at 282; *United States* v. *City of Buffalo, supra*, 633 F.2d at 647; *Firefighters Institute for Racial Equality* v. *City of St. Louis, supra*, 588 F.2d at 240-41; *United States* v. *City of Chicago, supra*, 549 F.2d at 437; *Louisville Black Police Officers Org., Inc.* v. *City of Louisville*, 511 F.Supp. 825, 839-40

(W.D.Ky. 1979); *Dozier* v. *Chupka*, *supra*, 395 F.Supp. at 859-60; *Shield Club* v. *City of Cleveland*, *supra*, 370 F.Supp. 251. They have done so to remedy discrimination by private employers as well. Indeed, use of non-victim specific remedies under Title VII is practically universal. See, *e.g.*, Second Circuit: *Rios* v. *Enterprise Ass'n Steamfitters Local 638 of U.A.*, *supra*, 501 F.2d at 629-30; *United States* v. *Wood, Wire and Metal Lath. Int'l U. Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Third Circuit: *United States* v. *Int'l Union of Elevator Const., Local Union No. 5*, 538 F.2d 1012, 1017-20 (3rd Cir. 1976); Fourth Circuit: *Chisholm* v. *United States Postal Service*, 665 F.2d 482, 498-99 (4th Cir. 1981); Fifth Circuit: *Phillips* v. *Joint Legislative Comm.*, 637 F.2d 1014, 1024, 1026 (5th Cir. 1981); *Local 53 of Int'l Ass'n of Heat & Frost I & A* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); Sixth Circuit: *United States* v. *Masonry Cont. Ass'n of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *United States* v. *Local Union No. 212, IBEW*, 472 F.2d 634, 636 (6th Cir. 1973); *Sims* v. *Sheet Metal Workers Int'l Ass'n Local No. 65*, 489 F.2d 1023, 1027-28 (6th Cir. 1973); Seventh Circuit: *Crockett* v. *Green*, 534 F.2d 715, 718 (7th Cir. 1976); *United States* v. *United Brotherhood of Carpenters & J. Loc. 169*, *supra*, 457 F.2d at 220-21; Eighth Circuit: *United States* v. *N.L. Industries, Inc.*, *supra*, 479 F.2d at 377; Ninth Circuit: *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); D.C. Circuit: *McKenzie* v. *Sawyer*, 684 F.2d 62, 79-80 (D.C. Cir. 1982). *See generally*, *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *United States* v. *Local 38, IBEW*, 428 F.2d 144, 149-51 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

The legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, makes clear a congressional commitment to judicial remedies other than individual

victim, rightful place remediation.[8] Congress re-enacted and amended section 706(g) in 1972 against a background of judicial construction of Title VII. Prior to passage of the 1972 act, Title VII had been held to authorize affirmative, non-victim specific relief. Federal courts had required admission of specific percentages of minorities to apprenticeship programs and establishment of special programs for minorities only, *United States* v. *Ironworkers Local 86*, 315 F.Supp. 1202, 1247-48 (W.D.Wash. 1970), *aff'd*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); preferential work registration, examination and referral procedures, *United States* v. *Sheet Metal Workers Inc. Ass'n Local U. 36*, 416 F.2d 123, 132-33 (8th Cir. 1969); and union referrals of one black worker for each white worker, *Local 53 of Int'l Ass'n of Heat & Frost I & A* v. *Vogler*, *supra*, 407 F.2d at 1055. See *United States* v. *Local 38, IBEW*, *supra*, 428 F.2d at 149-51 (remanding for entry of affirmative relief).

As a general rule, when Congress, without indicating a contrary intention, amends a statute which has been judicially construed, it is presumed to approve that construction. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 1841 n.66 (1982). Here, moreover, the legislative history indicates express approval of judicial remedies extending beyond victim specific relief. The section-by-section analysis of the final version of the bill submitted to the Senate with the conference report stated:

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not

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[8] The legislative history of the 1964 Civil Rights Act, on the other hand, reveals little specific consideration of the remedial powers of the federal courts. Instead, congressional attention was fixed upon the pervasive national problem of race discrimination. It was also directed toward reaching compromise on numerous questions regarding what practices should constitute unlawful discrimination. *See generally*, Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*.

> indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

118 Cong. Rec. 7166.

Committee reports and statements by the congressional leadership echo the point. The *Local 53* (Asbestos Workers), *Sheet Metal Workers* and *Ironworkers* cases were expressly cited, and the text of the *Ironworkers* case was placed into the record. H.Rep. 238, *supra*, 2144 n.2, 2149 n.4; 118 Cong. Rec. 1671-75. Senator Dominick placed into the record a statement from the EEOC's annual report for fiscal year 1970 that "The Commission feels that the course of litigation over the past year has been encouraging and that the law has developed in a liberal fashion appropriate to a humanitarian and liberal statute." 118 Cong. Rec. 697. Representative Perkins, Chairman of the House Committee on Labor and Education, noted that:

> The development of case law in the area of employment discrimination in recent years has made it increasingly clear that the most difficult problem encountered is not whether discrimination has occurred but what the appropriate remedy is to be. The question of remedy is further complicated when discriminatory practices are found to be inherent in basic methods of recruitment, hiring, placement or promotion.

117 Cong. Rec. 31960 (1971). And Senator Javits, one of the floor leaders of the Senate bill, contrasted the availability of non-victim specific affirmative relief under Title VII with the use of quotas under Executive Order 11246 by observing that, under Title VII, "[a]ffirmative action may be ordered, but only as a remedy in a case of proven discrimination." 118 Cong. Rec. 582.

The issue of the proper extent of remedial orders under Title VII was squarely joined over the Ervin amendment, which would have prohibited any requirement of employment "in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." *Id.* at 1662. In response to the proposal, Senator Javits pointed out that the Ervin amendment would prohibit "[t]he whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII." *Id.* at 1664. Senator Ervin argued that the amendment did nothing more than underline the existing provisions of section 703(j), but Senator Javits noted that "the courts have rejected much of the argument that we should — what in effect this amendment does — preclude preferential treatment under any and all circumstances, because it runs afoul of section 703(j)." *Id.* at 1665.[9] Senator Javits also argued that:

> the amendment . . . would deprive the courts of the opportunity to order affirmative action under Title VII of

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[9] Section 703(j) was designed to serve a specific and limited purpose — to preclude a finding of unlawful discrimination "solely on the basis of evidence that an imbalance exists . . ., without supporting evidence of another nature that the respondent has engaged or is engaging in such practice." 110 Cong. Rec. 9881-82 (1964) (Remarks of Senator Allott). Congress did not intend Title VII to require, as a matter of simple right and duty, that an employer maintain a racially balanced workforce, see 110 Cong. Rec. 7213 (1964), and section 703(j) was introduced to confirm such limits upon the requirements of the act, see *id.* at 12723 (Remarks of Sen. Humphrey).

However, in adopting section 703(j), Congress exhibited no intention to affect the remedies available to a federal court once a violation of the act had been established. *United Steelworkers* v. *Weber*, *supra*, 443 U.S. at 205 n.5. "[T]hat section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination. . . . Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." *United States* v. *Local 38, IBEW*, *supra*, 428 F.2d at 150. The result has been reached consistently by the lower courts, see, *e.g.*, *United States* v. *Ironworkers Local 86*, *supra*, 443 F.2d at 553-54; *Local 53 of Int'l Ass'n of Heat & Frost I. & A.* v. *Vogler*, *supra*, 407 F.2d at 1053-55. It is not challenged by petitioners or amici here.

> the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the efforts to correct these injustices.

Id. Senator Williams joined Senator Javits:

> — I am afraid — I am desperately afraid — that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination —
>
> — This amendment raises the real threat of destroying any potential for effective law enforcement. If this amendment is accepted, I earnestly suggest that we will have a law, but there will be little chance for order under the law again if this amendment should prevail.

Id. at 1676. The Ervin amendment was soundly defeated. *Id.*

"Thus we have in this instance unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of § 706(g) remedial power conferred by the 1964 Act. That indication is entitled to great weight." *United States* v. *Int'l Union of Elevator Const. Local Union No. 5, supra*, 538 F.2d at 1019-20; *accord Rios* v. *Enterprise Ass'n Steamfitters Local 638 of U.A., supra*, 501 F.2d at 630-31; *United States* v. *Local Union No. 212, IBEW, supra*, 472 F.2d at 636. In short, "Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11,246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action." *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 353 n.28 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

Indeed, the only amendments affecting the provisions of section 706(g) which were adopted in 1972 were not limitary but expansive. Congress re-enacted the original section and added language providing that court-ordered affirmative action "is not limited to" reinstatement, hiring and award of back pay and language providing that a remedial order may include "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). See *Franks* v. *Bowman Transportation Co., Inc., supra*, 424 U.S. at 763-64.

A hard and fast rule prohibiting any remedy other than individual victim, rightful place remediation would be inconsistent with the policies and provisions of Title VII. It is true that Title VII protects individuals, not groups. *Connecticut* v. *Teal*, ___ U.S. ___, 102 S.Ct. 2525, 2534 (1982); see *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978). However, the *Teal* and *Manhart* cases reflect only the rule that a remedy may not be denied to an individual who has proved discrimination against herself simply because there is, in aggregate, no statistically demonstrable discrimination against the group of which the individual is a member. In fact, Title VII is directed at discrimination against individuals because they are members of a group. *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); Duncan, *supra*, 17 Harv. C.R.-C.L. L. Rev. at 5, 12; Note, *Last Hired, First Fired Seniority*, 11 Colum.J.L.&Soc.Probs. 343, 385 (1975). Because race discrimination is generally directed against all members of the race, proof of individual victimization may often be an impossible task and an unrealistic exercise. See, *e.g.*, *United States* v. *Louisiana*, *supra*, 225 F.Supp. at 397; *cf. International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 364, 368, 371. Particularly is this so where past discrimination has resulted in systematic exclusion from employment, since the victims include not only those who stepped forward to be victimized directly but also all those who, knowing the system, never sought to acquire a claim rather than a job. *Id.* at 367; *United States* v. *Sheet Metal Workers Int'l Ass'n Local U. 36*, *supra*, 416 F.2d at 132.

> The person who applied and was discriminatorily rejected may, however, be the unusual case, since the fact that an employer refused to hire minority workers may have dissuaded these workers from making futile applications. Persons who were dissuaded from applying by the employer's reputation are discriminated against just as much by the layoff as those who actually applied and were rejected.

Note, *Last Hired*, *supra*, 88 Harv. L. Rev. at 1557. Unlike denial of promotion, transfer or other enhancement of present position, systematic exclusion from employment operates against virtually any and all members of the minority group. There is no discrete set of possible victims, and, in practical terms, there is little prospect of individually proving victimization. If the courts are confined, by rigid rule, to individual victim relief alone, the right of equal employment opportunity will be theoretically enshrined, but the wrong will often go without real remedy.

Individual victim, rightful place remediation is one remedy under Title VII. However, the Court has never said that such relief is the only proper remedy under the act, and it should not do so now. Absent remedial measures extending beyond individual victim relief, systematic exclusion from employment will perpetuate itself, and the effects of past discrimination will go uncured. See U.S. Comm'n on Civ. Rts., *supra*, 9-13.

The United States also argues that the last sentence of section 706(g) bars non-victim relief here. (Brief for the United States as Amicus Curiae at pp. 22-24.)[10] That sentence provides:

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[10] This represents a dramatic change of position by the United States in these very proceedings. In 1974, the United States opposed a petition for certiorari seeking review of the original court of appeals decision, including its non-victim specific relief, in the fire case. The United States, an active plaintiff at the time, argued to the Court: "Given a finding of racial discrimi-

> No order of the court shall require the . . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g). The United States, however, reads far more into this provision than was intended by Congress.

The last sentence of section 706(g), as originally drafted, prohibited a court from ordering affirmative equitable relief for anyone who was refused employment or advancement or who was suspended or discharged for "cause". See House Judiciary Committee report accompanying the submission of H.R. 7152, H.R.Rep. 914, 88th Cong., 1st Sess., reprinted in 1964 U.S. Code Cong. and Admin. News 2405; Vaas, *Title VII: Legislative History*, 7 B.C. Ind. Com. L. Rev. 431, 438 (1966). This language reflected a concern that the Act should not be applied so as to require an employer to hire, retain or promote an individual who was not qualified or to do so where there has been no employment discrimination. See, *e.g.*, 110 Cong. Rec. 8219, 14320.

Congressman Celler, who introduced the administration's omnibus civil rights bill, offered an amendment to clarify the meaning of the last sentence of § 706(g). The amendment struck the word "cause" and substituted the phrase "any

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nation in employment, affirmative hiring relief of some sort, with numerical objectives, is both appropriate and constitutional. As petitioners apparently acknowledge. . ., such relief has uniformly been sustained by the courts of appeals. Indeed, the failure of a district court to order such affirmative relief after a finding of racially discriminating employment practices has been held to be an abuse of discretion." *Commissioners and Director of Civil Service* v. *Boston Chapter, NAACP, Inc.*, No. 74-746, Brief for the United States in Opposition p. 14 (1974).

reason other than discrimination on account of race, color, religion or national origin." 110 Cong. Rec. 2567. In offering the amendment, Representative Celler stated:

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other — and I emphasize 'other' — than discrimination on the grounds of race, color, religion or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of the amendment.

Id.

The only member of the House to address the substance of the amendment was Representative Gill, who supported it as an effort to "define more exactly the reasons for which a discharge can be contested under this act." *Id.* at 2568. Mr. Gill stated:

> I would just like to point out . . . by striking the word 'cause' and adding the words 'any reason other than discrimination on account of race, color, religion or national origin', our purpose is to pinch down the orders that can be issued by the court to a more narrow range. Thus, we would not interfere with discharges for ineptness, or drunkenness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act.

Id. at 2570. The purpose of this provision was to ensure that federal courts act under Title VII only to remedy employment practices which are discriminatory. "The sentence merely

preserves the employer's defense that the non-hire, discharge, or non-promotion was for cause other than discrimination." *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, *supra*, 556 F.2d at 176; see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292, 298-99 (1982) (Brodin). Indeed, it appears that in amending the language of the bill, congressional concern was to draw a line between the ambit of Title VII and that of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, as well as to define the types of employment practices which the federal courts could remedy. Thus Representative Gill stated:

> For instance, you may have many other situations, such as unfair labor practices under the Taft-Hartley law which would not be covered under this amendment. This amendment merely makes sure it will be covered under some other act rather than this one.

110 Cong. Rec. 2568.

Although section 706(g) was "expressly modeled," *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419 & n.11, on analogous provisions of section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), "[t]he principles developed under the [National Labor Relations Act] generally guide, but do not bind, courts tailoring remedies under Title VII." *Ford Motor Co.* v. *Equal Employment Opportunity Comm'n*, ____ U.S. ____, 102 S.Ct. 3057, 3062-63 n.8 (1982). "To the extent that there is a difference in the wording of the respective provisions, § 706(g) grants, if anything, broader discretionary powers than those granted the National Labor Relations Board." *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 769 n.29. Section 706(g) grants remedial powers to a district court, not to an administrative agency. See Brodin, *supra*, 82 Colum. L. Rev. at 297-98 n.26. The court,

in addition, is empowered to issue "other equitable relief" as well as those analogous remedies specified in the National Labor Relations Act. Section 706(g) provides for judicial relief in cases where discrimination has occurred; there is nothing in the legislative history of the last sentence of the section which indicates congressional intent to limit equitable remedies once unlawful discrimination has been found. See Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees who Protest Discrimination in Private Employment*, 50 N.Y.U. L. Rev. 1179, 1220-21 n.166 and 167 (1975).

Moreover, the last sentence of section 706(g) is not even relevant to the court orders now under review. The district court's August 7, 1981 orders did not direct the "hiring, reinstatement or promotion" of any individual. They prohibited the termination of minority employees below specified levels of representation. And they did this in a special context for a special purpose: to prevent the frustration of unfinished relief.

B. *The District Court's Orders Were Not Barred By Section 703(h) Of Title VII*

The provisions and policy of section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), do not prohibit the district court's August 7, 1981 orders. Plaintiffs did not challenge the lawfulness of the Massachusetts civil service seniority statute, and they did not seek to establish a violation of Title VII by reason of the City's layoff program. Rather, they sought to modify relief which was based upon a past adjudication of liability.

Section 703(h) is definitional, establishing a liability standard only. It therefore has no bearing upon the proper scope of remedies. Section 703(h) does not "qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII . . . in circumstances where an illegal discriminatory act or practice is found." *Franks* v. *Bowman Transportation Co.*,

Inc., *supra*, 424 U.S. at 758. See *id.* at 758-62; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 346-47; *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, *supra*, 556 F.2d at 174.

The district court's orders had definite, but limited, impact upon operation of the civil service seniority system. (See *supra*, pp. 31-32). The orders required the seniority scheme to operate within two pools; otherwise, they superseded no provisions of the statute. The orders effected no across-the-board competitive seniority benefits. For that matter, the orders conferred no lasting benefit and have no lasting effect. Importantly, the orders incorporated the statutory requirement that upon reinstatement or rehiring original seniority ranking would be restored.

The district court's orders cannot be said to deprive Boston police officers and firefighters of indefeasibly vested rights. "This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 778. The Court has also noted that those expectations may be disappointed by modification of collective bargaining agreements and that "the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority', is certainly no less than in other areas of public policy interests." *Id.* at 779.

The seniority interests of Boston police officers and firefighters are not contract rights, for seniority is governed entirely by Massachusetts civil service law. (Jt. App. 45, 81). Seniority arrangements do not represent here the achievement of organized labor or the fruit of collective bargaining. The district court's orders did not interfere with "the policy favoring minimal supervision . . . over the substantive terms of collective bargaining agreements." *American Tobacco Company* v. *Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1541 (1982).

In establishing the requirements, priorities and preferences which affect both job eligibility and order of layoff, the Massachusetts statute reflects a variety of public policies. According greater job security to those with longer service is only one. Civil service examination results and various priorities based upon veterans status and residence affect the date of original employment and thereby affect the length of tenure. See Mass. Gen. Laws c. 31, §§ 1, 6, 7, 26, 58.[11] Moreover, although separation from employment for lack of work or money or abolition of position is based upon length of service, disabled veterans enjoy an absolute preference. Mass. Gen. Laws c. 31 §§ 26, 39. Indeed, the disabled veterans preference here protected from layoff approximately 63 non-minority police officers and approximately 47 non-minority firefighters.[12] In the absence of this preference, layoffs in the Police Department would only have reached non-minorities with seniority dates of February 1974 and in the Fire Department of August 1977.

The statutory arrangement also drastically undercuts any reliance interest based upon length of service. Expectations

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[11] These priorities affect large numbers of civil service candidates and employees. *See generally, Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979). For example, preferences for disabled veterans benefit any individual receiving disability benefits from the United States Veterans Administration. Mass. Gen. Laws c. 31 § 1; c. 4 § 7. On the other hand, no veterans preferences of any sort were extended to Vietnam era veterans, a group including large numbers of racial minorities, until 1976. *Id.*

[12] These figures may be determined from seniority rosters and disabled veterans lists maintained by the Police and Fire Departments. The impact of the disabled veterans preference in the police case is referred to in the August 3, 1981 Supplemental Stipulation (Jt.App. 90), and the magnitude of its effect on the order of layoffs which otherwise would have occurred strictly by seniority may be ascertained by comparing the number of officers laid off with the number of officers hired in each department during the period between 1974 and 1980. (See Jt.App. 43, 79). Thus, the Police Department intended to lay off 252 officers; yet 250 new officers had been hired in 1979-80 alone. Similarly, the Fire Department intended to lay off 207 officers; yet over 275 officers had been hired in 1978-80 alone.

of public employees may be modified or defeated at any time by new legislation. Massachusetts law is well-settled on this score. "The Legislature has the power to create offices, establish their tenure, define the eligibility of those seeking such offices, fix their compensation or duties, change the tenure, compensation or duties, and abolish all of such offices. . . ." *Nichols* v. *Comm'r of Public Welfare*, 311 Mass. 125, 130, 40 N.E.2d 275, 279 (1942). *Accord McCarthy* v. *Sheriff of Suffolk County*, 366 Mass. 779, 784, 322 N.E.2d 758, 762 (1975); *Comm'r of Admin.* v. *Kelley*, 351 Mass. 686, 691, 223 N.E.2d 670, 674 (1967). The rule applies to civil service employees as well as to all others. See, *e.g.*, *Cullen* v. *Mayor of Newton*, 308 Mass. 578, 580, 32 N.E.2d 201, 203 (1941); *McNeil* v. *Mayor and City Council of Peabody*, 297 Mass. 499, 503-04, 9 N.E.2d 566, 568 (1937); *Director of Civil Defense* v. *Leger*, 9 Mass. App. Ct. 737, 404 N.E.2d 679, 681 (1980). Indeed, in recently addressing Boston's fiscal affairs, the Massachusetts legislature specially conferred permanent and paramount job security on those police officers and firefighters who had been laid off during the City's 1981 reduction in force program, thus superseding the civil service statute and abrogating the expectations of other personnel. (See *supra*, pp. 13-14.)

The district court's orders did not conflict with the basic policies served by seniority systems, including protection of the worker from employer favoritism, see, *e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604-05 (1969) (Cooper & Sobol), and from replacement at an advancing age with younger, and cheaper, labor, see, *e.g.*, Poplin, *Fair Employment in a Depressed Economy*, 23 U.C.L.A. L. Rev. 177, 197 (1975). The superseding of seniority expectations here was the result of court order, not employer election. Possible injustice at the hands of the employer is irrelevant. The orders set objective criteria and, aside from pooling, based them upon the provisions of the existing statute. There has been no risk of caprice,

and there has been no charge that the orders disrupted Police or Fire Department management. Finally, although seniority gives employees some basis for predicting their future employment position, Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-05, in actuality the employee predictive interest is reduced to guesswork. The magnitude of any layoff program, the extent of intervening junior hires, the number of officers with preference status and the extent of department or rank transfers all have profound effect upon the individual employee's ability to predict, and derive security from, seniority status.

Seniority is an important feature of labor relations, but it is neither a practice nor a policy which ought to control these cases singlehandedly. Petitioners would have the principle of seniority override all other considerations. This is unwarranted. As a necessary means to prevent eradication of an ongoing remedy of race discrimination, the district court's orders served national policies of the "highest priority." *Newman* v. *Piggie Park Enterprises*, *supra*, 390 U.S. at 402. The compelling public interest in eradicating the effects of racial discrimination in public safety employment, the history of prior discrimination in these cases and the need to prevent frustration of an ongoing process of remediation called for careful weighing as well. The district court properly considered these factors and correctly found that the provisions of section 703(h) did not bar the exercise of its equitable power.

IV. The District Court's Orders Were Not Barred By The Tenth Amendment

The State Petitioners rely upon *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to argue that each of the district court's orders is invalid under the Tenth Amendment because it

"regulates the 'States as States,' addresses 'matters that are indisputable attributes of state sovereignty,' and directly impairs the States' ability to structure integral operations in areas of traditional governmental functions." (See Brief for State Petitioners p. 77). The State Petitioners assert a limitation on federal judicial power; they do not merely challenge the propriety of the exercise of power concededly possessed. The State Petitioners claim, in effect, that the district court does not have the power, in a race discrimination case, to issue a remedial order affecting municipal employment arrangements established by state civil service law. The argument is not supported by *Usery* and is unsound.

These race discrimination cases were brought under the Fourteenth Amendment and statutes enforcing it. In *Usery*, by contrast, the Court dealt only with the limits set by the Tenth Amendment on congressional exercise of Commerce Clause powers. The Court explicitly refrained from expressing any view regarding the extent of congressional power "to affect integral operations of state government" under other sections of the Constitution, including in particular the Fourteenth Amendment. *Id.* at 852 n.17.

The Fourteenth Amendment sets limits on the power of the states. The Tenth Amendment, consequently, bars neither congressional enforcement nor judicial enforcement of the Fourteenth Amendment. Congressional power to regulate state action is vastly greater under the Fourteenth Amendment than under the Commerce Clause. "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action. . . ." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 454 (1976), quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880). In *Bitzer*, the Court held that Title VII did not violate principles of state sovereignty preserved by the Eleventh Amendment. The Court said:

> the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Id. at 456.

Similarly, the Court has rejected Tenth Amendment challenge to suits under 42 U.S.C. § 1983. "The Tenth Amendment's reservation of nondelegated Powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Monell* v. *New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690 n.54 (1978), quoting *Milliken* v. *Bradley, supra*, 433 U.S. at 291, and citing *Ex Parte Virginia, supra*, 100 U.S. at 347-48. And it has been held that the Tenth Amendment does not bar application of Title VII to states and their subdivisions. *Norris* v. *Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 336 (9th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 205 (1982); *Love* v. *Waukesha Joint School District #1, Bd. of Ed.*, 560 F.2d 285, 287 (7th Cir. 1977).

The State Petitioner's Tenth Amendment argument relies critically upon the fact that the district court's orders affected areas of traditional government function and state sovereignty. The argument, consequently, denies the power of the federal judiciary to enforce the civil rights laws and the Constitution in all areas of state employment, and of public education as well. The logic of the argument belies its merit.

Suggestion of Mootness

The controversy once presented in this case has become moot as a result of enactment of 1982 Mass. Acts c. 190, providing for reinstatement of all officers terminated pursuant to the City's 1981 reduction in force program, and as a result of the City's recent resumption of hiring of new officers. (See Petition for Writ of Certiorari of Boston Firefighters Union, Local 718 p. 8.) Absent actual controversy, the Court has no jurisdiction, *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), and the petitions should be dismissed as improvidently granted.

The Court has ruled that:

> "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" . . . jurisdiction, properly acquired, may abate if the case becomes moot because
>
> (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> (2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. *Davis*, 440 U.S. 625, 631 (1979). The standards are met here. Because all officers laid off in 1981 have been rehired, there is no live case or controversy with respect to the district court's August 7, 1981 orders. Because the recent statute guarantees all reinstated officers security against future layoff, there is no possibility that the controversy could be repeated between the same parties. And because

the Police and Fire Departments are under obligations to maintain minimum staffing levels and have resumed hiring, there is no reasonable likelihood that future layoffs will occur.

The Unions and the United States as amicus curiae, however, assign three reasons why the controversy is not moot. Each is misconceived. First, one Union petitioner and the United States argue that the controversy remains alive because of pending claims for back pay brought before the Massachusetts Civil Service Commission by officers who were laid off during the City's layoff program and assert that they would not have been laid off had the reductions in force proceeded strictly in accordance with seniority. (Firefighters Petition pp. 17-18; Brief for United States p. 9.) Yet, the issue for decision in the civil service proceedings is not the issue for decision here; the decision here will not dispose of the claim raised there; and the decision here will not relieve the injury that assertedly remains unremedied.

The only issue for decision in the civil service proceedings is whether the action of the City in terminating any officer "was justified." Mass. Gen. Laws c. 31 § 42. See *Cambridge Housing Authority* v. *Civil Service Comm'n*, 7 Mass. App. Ct. 586, 588, 389 N.E.2d 432, 433-34 (1979). This is a matter exclusively of state law, and neither the Court nor the lower federal court has been asked to pass on the question.

Because the Court cannot adjudicate the back pay claim, it cannot grant relief on the claim which is said to keep the controversy alive. When, due to changed circumstances, a court cannot grant such relief in proceedings then pending before it, the case has become moot. *Alejandrino* v. *Quezon*, 271 U.S. 528, 533-35 (1926). Compare *Powell* v. *McCormack*, 395 U.S. 486, 497-99 (1969); *Bond* v. *Floyd*, 385 U.S. 116, 128 n.17 (1966). The basic rationale of mootness doctrine compels this result. Mootness is "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363,

1384 (1973), quoted with approval in *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980). This personal interest exists only when the claimed injury can be redressed by a favorable decision of the court before which the claim is pending. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). That a decision may be dispositive of an issue raised in proceedings pending in another tribunal does not save any case before a court from being moot. See *California* v. *San Pablo and Tulare R.R. Co.*, 149 U.S. 308, 314 (1893).

Moreover, there is no credible basis for assuming that a decision of the Court, even a reversal, would have dispositive effect upon any back pay claim. The Boston layoffs were accomplished pursuant to an outstanding federal court order. As such, they were justified at the time they were implemented. This justification cannot be lost by any subsequent reversal of the order. A court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain legal duty to obey until it is stayed, vacated or reversed. This is true under federal law, *Maness* v. *Meyers*, 419 U.S. 449, 458-59 (1975); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947), and under Massachusetts law, *Town of Stow* v. *Marinelli*, 352 Mass. 738, 743-44, 227 N.E.2d 708, 713 (1967).

Second, the Unions and the United States suggest that layoffs out of seniority order "may defer" officers' eligibility to sit for promotional examinations. (Firefighters Petition p. 8; Brief for Boston Police Patrolmen's Ass'n p. 7 n.1; Brief for United States p. 9 n.8.) This is plainly not the case. Although eligibility to sit for promotional examinations is subject to length of service, Mass. Gen. Laws. c. 31, § 59, an employee whose service is terminated due to reduction in force and who is thereafter reinstated loses no time for purposes of promotional eligibility. Mass. Gen. Laws c. 31, § 33 expressly provides that, in making any computation of length of service, "the continuity of service of such employee shall be deemed

not to have been interrupted if such absence was the result of . . . abolition of position or layoff because of lack of work or money. . . ." Consequently, the layoff of any now-reinstated officer could affect promotional eligibility only if a promotional examination had been administered during the period of layoff. This was not the case, however, and no party has claimed that it was.

Third, the Unions and the United States assert that the district court's orders have permanent effect and that therefore the case is not moot under the teaching of *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974). (Briefs and Petitions, *supra*.) The argument, however, mischaracterizes the orders below. The decrees were addressed solely to the City's 1981 layoffs, events long passed. The decrees express no permanence of prohibition; plaintiffs sought none; the situation called for none; and the ongoing remedial programs, of which the modification orders were a part, presuppose none.

The controversy asserted here cannot be characterized as "capable of repetition yet evading review." *Super Tire Engineering Co.* v. *McCorkle*, *supra*, 416 U.S. at 122. *Super Tire* addressed a claim regarding "policy [which] is fixed and definite. It is not contingent upon executive discretion." *Id.* at 124. Neither the City's layoff program nor the district court's order was fixed or permanent. The layoff program is over. Given the permanent job security and prohibition of reduction in staffing through fiscal 1983 which are mandated by 1982 Mass. Acts, c. 190, there is no "reasonable expectation" or "demonstrated probability", *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982), that the circumstances giving rise to plaintiffs' motions for modified relief will occur again. Indeed, the statute precludes the possibility that a controversy will occur involving the same officers on whose behalf the present proceedings were brought. See *id.* Moreover, any future order of the district court would depend upon future circumstances. Its issuance is not certain; indeed, both its issuance and its terms would be discretionary. Nothing is now fixed, and nothing in the future would evade review.

Conclusion

The petitions should be dismissed as improvidently granted. If the Court reaches the merits, the judgment of the court of appeals should be affirmed.

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APPENDIX A

MASSACHUSETTS ACTS OF 1982
Chapter 190

AN ACT Establishing the City of Boston Funding Loan Act of Nineteen Hundred and Eighty-Two And The Massachusetts Convention Center Authority.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first, nineteen hundred and eighty one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the city of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in injured leave under

the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

APPENDIX B

Statistical Comparison of Black and/or Hispanic Representation in Police Forces and in Relevant Populations

Made By Federal Courts in Employment Discrimination Cases During the 1970's

Political Subdivision	Minority Percentage In Police Force	Minority Percentage In Population
1. Akron, OH	3%	17.5%
2. Alabama	0%	N/A
3. Albuquerque, NM	21.4%	39.2%
4. Baltimore, MD	14.39%	47%
5. Baton Rouge 39 Municipalities 9 Parishes in LA	8.2%	27.3%
6. Boston, MA	2.3%	16.3%
7. Buffalo, NY	2.72%	23.7%
8. Chicago, IL	17%	40%
9. Cleveland, OH	8.1%	38%
10. Detroit, MI	17%	50%
11. East Cleveland, OH	12%	60%
12. East Providence, RI	.8%	3.5%
13. Erie, PA	1.4%	6.8%
14. Illinois State Highway Police	1.7%	14.7%
15. Mississippi Highway Patrol	.7%	36.7%
16. Mobile, AL	12%	
17. North Chicago, IL	.08%	50%
18. Oakland, CA	3-4%	32-45%

Political Subdivision	Minority Percentage In Police Force	Minority Percentage In Population
19. Penn Hills Township, PA	0%	4.5%
20. Philadelphia, PA	18%	34.7%
21. Pittsburgh, PA	5.9%	20%
22. St. Petersburg, FL	7.5%	14.75%
23. Santa Ana, CA	9.2%	25.8%
24. Toledo, OH	8.4%	16%

Source of Data

1. *Arnold v. Ballard*, 390 F.Supp. 723, 726 (N.D.Ohio 1975)
2. *NAACP v. Allen*, 340 F.Supp. 703, 705 (M.D.Ala. 1972), *aff'd and remanded*, 493 F.2d 614 (5th Cir. 1974)
3. *Chicano Police Officers' Ass'n v. Stover*, 526 F.2d 431, 439 n.10 (10th cir. 1975), *vacated and remanded*, 426 U.S. 944 (1976), *on remand*, 552 F.2d 918 (10th Cir. 1977)
4. *Vanguard Justice Society, Inc. v. Hughes*, 471 F.Supp. 670, 724 (D.Md. 1979)
5. *United States v. City of Alexandria*, 614 F.2d 1358, 1360 (5th Cir. 1980)
6. *Castro v. Beecher*, 334 F. Supp. 930, 935 (D.Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725, 728 n.1 (1st Cir. 1972), *on remand*, 365 F.Supp. 655 (D.Mass. 1973)
7. *United States v. City of Buffalo*, 457 F.Supp. 612, 621 (W.D.N.Y. 1978), *aff'd*, 633 F.2d 643 (2d Cir. 1980)
8. *United States v. City of Chicago*, 385 F.Supp. 543, 548 (N.D.Ill. 1974), 411 F.Supp. 218 (N.D.Ill. 1976), *aff'd in part and rev'd in part*, 549 F.2d 415 (7th Cir. 1977)
9. *Shield Club v. City of Cleveland*, 370 F.Supp. 251, 255 (N.D.Ohio 1972)
10. *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 681 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)
11. *Smith v. City of East Cleveland*, 363 F.Supp. 1131, 1134 (N.D.Ohio 1973), *aff'd in part, rev'd in part*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976)
12. *Pina v. City of East Providence*, 492 F.Supp. 1240, 1242 (D.R.I. 1980)
13. *Erie Human Relations Comm'n v. Tullio*, 357 F.Supp. 422, 425 (W.D.Pa. 1973), *aff'd*, 493 F.2d 371 (3rd Cir. 1974)

14. *Washington v. Walker*, 529 F.2d 1062, 1063 (7th Cir. 1976)
15. *Morrow v. Dillard*, 412 F. Supp. 494, 498 (S.D. Miss. 1976), *aff'd in part, rev'd in part*, 580 F.2d 1284 (5th Cir. 1978)
16. *Allen v. City of Mobile*, 331 F. Supp. 1134, 1137 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir 1972), *cert. denied*, 412 U.S. 909 (1973)
17. *Bridges v. City of North Chicago*, 402 F.Supp. 418, 420 (N.D.Ill. 1975)
18. *Penn v. Stumpf*, 308 F.Supp. 1238, 1243 n.7 (N.D.Cal. 1970)
19. *Commonwealth of Pennsylvania v. Sebastian*, 368 F.Supp. 854, 855 (W.D.Pa. 1972), *aff'd*, 480 F.2d 917 (3rd Cir. 1973)
20 *Commonwealth of Pennsylvania v. O'Neil*, 348 F.Supp. 1084, 1087 (E.D. Pa. 1972), *aff'd in part, modified in part*, 473 F.2d 1029 (3rd Cir. 1973)
21. *Commonwealth of Pennsylvania v. Flaherty*, 404 F.Supp. 1022, 1024 (W.D.Pa. 1975)
22. *Drayton v. City of St. Petersburg*, 477 F.Supp. 846, 850 (M.D. Fla. 1979)
23. *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 880 (C.D.Cal. 1970)
24. *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 917 (6th Cir. 1979)

APPENDIX C

Statistical Comparison of Black and/or Hispanic Representation in Fire Departments and in Relevant Populations Made by Federal Courts in Employment Discrimination Cases During the 1970's

Political Subdivision	Minority Percentage In Fire Department	Minority Percentage In Population
1. Baton Rouge, LA	2%	27%
2. Baltimore, MD	13.7%	47%
3. Boston, MA	.9%	23%
4. Bridgeport, CT	.2%	41%
5. Buffalo, NY	1.2%	24.3%
6. Columbus, OH	2.31%	18.5%
7. Detroit, MI	7.5%	50%
8. Jacksonville, FL	12%	———
9. Los Angeles, CA	3.3%	29.1%
10. Memphis, TN	10%	33-37%
11. Minneapolis, MN	.3%	6.44%
12. New York, NY	5.6%	32%
13. Pittsburgh, PA	3.9%	20%
14. San Francisco, CA	.2%	43%
15. St. Louis, MO	11%	40%
16. St. Paul, MN	1.3-2%	8%
17. St. Petersburg, FL	3.9%	14.75%
18. Santa Ana, CA	4.5%	25.8%
19. Toledo, OH	1.8%	16%
20. Westchester County, NY		
New Rochelle	3.9%	16.1%
Mt. Vernon	3.1%	36%
White Plains	3.4%	15.4%

Source of Data

1. *United States v. City of Alexandria*, 614 F.2d 1358, 1360 (5th Cir. 1980)
2. *Harper v. Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1193 (D.Md.), *aff'd in part and modified in part sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973)
3. *Boston Chapter NAACP, Inc. v. Beecher*, 371 F.Supp. 507, 514 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)
4. *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 265 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1611 (1982)
5. *United States v. City of Buffalo*, 457 F. Supp. 612, 621 (W.D.N.Y. 1978), *aff'd*, 633 F.2d 643 (2d Cir. 1980)
6. *Dozier v. Chupka*, 395 F.Supp. 836, 840 (S.D. Ohio 1975)
7. *Van Aken v. Young*, 541 F.Supp. 448, 460 (E.D. Mich. 1982)
8. *Corley v. City of Jacksonville*, 506 F.Supp. 528, 530 (M.D. Fla. 1981)
9. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1337 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979)
10. *Stotts v. Memphis Fire Department*, 679 F.2d 541, 550 (6th Cir. 1982), *petition for cert. pending.*
11. *Carter v. Gallagher*, 452 F.2d 315, 323, *modified on rehearing en banc* 452 F.2d 327, 328 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972)
12. *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Comm'n of the City of New York*, 490 F.2d 387, 398 (2d Cir. 1973)
13. *Commonwealth of Pennsylvania v. Glickman*, 370 F.Supp. 724, 729 (W.D. Pa. 1974)
14. *Western Addition Community Organization v. Alioto*, 369 F.Supp. 77, 79 (N.D. Cal. 1973), *appeal dismissed*

as moot, 514 F.2d 542 (9th Cir. 1975), *cert. denied*, 423 U.S. 1014 (1975)

15. *Firefighters Institute for Racial Equality v. City of St. Louis, Missouri*, 616 F. 2d 350, 363 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981)
16. *Fowler v. Schwarzwalder*, 351 F.Supp. 721, 723 (D. Minn. 1972)
17. *Drayton v. City of St. Petersburg*, 477 F.Supp. 846, 850 (M.D. Fla. 1979)
18. *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 879 (C.D.Cal. 1976)
19. *Brown v. Neeb*, 644 F.2d 551, 555 (6th Cir. 1981)
20. *Vulcan Society of Westchester County, Inc. v. Fire Department of White Plains*, 505 F. Supp. 955, 958 (S.D.N.Y. 1981)

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In the Supreme Court of the United States.

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BOSTON FIREFIGHTERS UNION, LOCAL 718,
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v.
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RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
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v.
PEDRO CASTRO, ET AL.,
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NANCY B. BEECHER, ET AL.,
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RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioner, Boston Firefighters Union, Local 718.

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Table of Authorities Cited.

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Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971)	17n
Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972)	2n
Connecticut v. Teal, ___ U.S. ___, 102 S.Ct. 2525	4

Contractors Association v. Schultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971) 16n

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 18, 19

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Griggs v. Duke Power Co., 402 U.S. 414 (1971) 14

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Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 14, 15, 16

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Regents of University of California v. Bakke, 438 U.S. 265 (1978) 4

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Shelley v. Kraemer, 334 U.S. 1 (1948) 4

Sibron v. New York, 392 U.S. 40 (1968) 18

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United States v. Central Motor Lines, Inc., 325 F.Supp. 478 (W.D.N.C. 1970) 14n

United States v. Ironworkers Local 86, 315 F.Supp. 1202 (W.D. Wash. 1970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) 14, 15, 16

United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970) 14, 15

United States v. Local 638, Steamfitters, 337 F.Supp. 217 (S.D.N.Y. 1972) 16n

United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) 14, 15

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Washington v. Davis, 426 U.S. 229 (1976) 3

Zipes v. Trans World Airlines, Inc., 455 U.S. 915, 102 S.Ct. 1127 (1982) 8n

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioner, Boston Firefighters Union, Local 718.

Introduction.

Respondents' brief concedes these salient points:

(1) The district court in both the police and fire cases made no findings of purposeful discrimination in certification and

recruitment procedures and even acknowledged its absence. Respondent's Brief, pp. 40 and 42;[1]

(2) The beneficiaries of the district court order suppressing the Massachusetts civil service seniority statute, Mass. Gen. Laws c. 31, § 39 were not victims of any certification (examination) or recruitment practice adjudicated to be discriminatory in impact. *Id.* at 12, 26, 46 *et seq.*[2]

(3) No challenge to the lawfulness of § 39 was offered and no claim that seniority based layoffs were illegal was made. *Id.* at 58; and brief in opposition to cert. at 16.

These admissions expose errors that are replete in the respondents' extensive contentions and in the points urged by their amici as this reply brief demonstrates.

Argument.

I. Respondents' Recurrent Theme that New Relief is Justified on Fourteenth Amendment Grounds Fails Because of Explicit Findings of No Purposeful Discrimination.

The certification (examination) and recruitment practices protested in the 1970 police case complaint and the 1972 private fire case complaint as violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 were adjudicated as discriminatory in impact only and not purposeful. Decrees did improve minority access to both city departments in the ensuing decade and no attempt at a collateral attack on those early decrees is even suggested by petitioner, Local 718.

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[1] The First Circuit has been explicit that the only adjudicated violations were *not* intentional ones, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (firefighters); *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

[2] *See also*, brief of respondents in opposition to petitioners for a writ of certiorari at 20. The First Circuit candidly acknowledges that layoff immunities were conferred on non-victims. 679 F.2d 975, 977.

After entry of the earlier decrees, decisions of this Court established that unintentional discrimination does not violate the Fourteenth Amendment (and hence does not violate §§ 1981 and 1983). *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-274 (1979); *Arlington Heights* v. *Metropolitan Housing Div. Corp.*, 429 U.S. 2[illegible] (1977); and *Washington* v. *Davis*, 426 U.S. 229 (1976). *Accord, General Bldg. Contractors Ass'n* v. *Pa.*, ___ U.S. ___, 102 S.Ct. 3141, 3149-3150 (1982). The present disputed order is built upon findings of violation now recognized as incorrect. Under these circumstances, this expansion of relief to further redress such improper Fourteenth Amendment findings was beyond the authority of the lower courts. The arguments in the brief of amici AFL-CIO and Public Employee Department, AFL-CIO at 2-4, in the brief of amicus Equal Employment Advisory Council at 10-14, and in the brief of amicus International Association of Fire Fighters, AFL-CIO at 10-12 establish that the lower courts had no authority on the basis of Fourteenth Amendment findings to so modify the earlier decrees. *See*, United States, Amicus Brief at 3 n.3 and Anti-Defamation League, Amicus Brief at 16-20.

Yet a recurrent theme in respondent's expanded brief and a predominate argument in their supporting *amici* filings is that the early 1970's findings of constitutional violations, now discredited, warrant new and further constitutional remedies in 1981, *e.g.*, Respondent's Brief at 19-29 and at 34. The plain fact is that intervening changes in law impeach any Fourteenth Amendment (and §§ 1981 and 1983) basis for a seniority suppression in 1981.

II. Employment Preference Remedies for Unconstitutional Exclusions Must be Limited to Relief Available Under Title VII.

Respondents consistently urge that racial *groups* can insist on preference remedies once unconstitutional discrimination is established (which is not the case here), *e.g.*, Respondent's Brief at 24-29. They argue that membership in the *group*

entitles all *group* members to the benefits of employment preferences. Their argument denies a fundamental constitutional principle. The Fourteenth Amendment confers rights upon individuals and not *groups*; it invests no *group* with special status. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). The principle is well stated thus:

> It is settled beyond question that the rights created by the first section of the Fourteenth Amendment, are by its terms guaranteed to the individual. If it is the individual who is entitled to judicial protection against classification based on his racial or ethic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.

Regents of University of California v. *Bakke*, 438 U.S. 265, 301 (1978) (Opinion of Powell, J.).

Accord, *Connecticut* v. *Teal*, _____ U.S. _____, 102 S.Ct. 2525, 2534 ("The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole").

In any event, these are equal employment opportunities cases asserting Fourteenth Amendment claims pursuant to 42 U.S.C. §§ 1981 and 1983. When formulating remedies in such cases, 42 U.S.C. § 1988 instructs federal courts to act "in conformity with the laws of the United States" and such "law" includes § 703(h) and 706(g) of Title VII. *See*, Local 718's Brief at 15, 16.[3] *Note*, United States Constitution, Art. III, § 1.

Relief in §§ 1981 and 1983 litigation must take into account Congress's specific concern for and the special approval it accorded seniority systems in § 703(h) and the limits on judicial

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[3] Clearly Congress conferred immunity upon *bona fide* seniority systems and their applications in § 703(h); and it is absurd to contend that invocation of 42 U.S.C. §§ 1981 and 1983 renders such innocent seniority systems vulnerable to the suppression imposed in this case. *See*, *Setser* v. *Novack, Inv. Co.*, 657 F.2d 962, 966-967 (8th Cir. 1981) (*see also*, Local 718's Brief at 16 and notes).

remedies Congress imposed in § 706(g), discussed in Part III *infra* at III.[4] Neither respondents nor their amici discuss the congruence between remedies under Title VII and remedies under §§ 1981 and 1983 that 42 U.S.C. § 1988 imposes in civil rights employment litigation.

III. Respondents Misapprehend the Terms and Legislative History of §§ 703(h) and 706(g) and the Relevant Decisions of this Court.

1. Respondents contend, at 58-62, that Local 718's reliance upon § 703(h) is misplaced, because § 703(h) is a substantive provision defining the scope of permissible conduct and is not a remedial provision. That contention rests on respondents' reading of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1977). But *Franks* does not, as respondents contend, preclude consideration of the congressional intent to protect seniority stated in § 703(h) when it comes to the shaping of relief under the Act's remedial provision, § 706(g).

In *Franks*, *supra*, the plaintiffs were identifiable victims of post-Act hiring discrimination who sought merely their "rightful place": the place *in the seniority system* that the plaintiffs would have occupied but for the employer's discriminatory refusal to hire them. The court held that the congressional desire to protect seniority did not preclude that particular relief and in so doing stated:

> Petitioners do not ask for modification or elimination of the existing seniority system, but only for an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. *It is this context that must shape our determination as to the meaning and effect of § 703(h).* 424 U.S. at 758, emphasis added.

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[4] Likewise relief in civil rights act litigation must be limited by the congressional hostility to governmentally imposed quotas expressed in § 703(j).

In contrast to the relief sought in *Franks*, the relief ordered in the instant case *does* constitute a "modification . . . of the existing seniority system." The challenged order here provides that persons who were *not* "victims of illegal discrimination" are able to retain employment in preference to persons who have committed no wrong and who have superior seniority claims to that employment. Post-*Franks* decisions of this Court make clear that the *Franks* holding does not preclude consideration of the values underlying § 703(h) in determining relief pursuant to § 706(g). *See infra*, at 7, 8. When those values are considered, it follows that § 706(g) does *not* allow the courts to provide racial preferences to non-victims that override seniority rights of incumbent employees.

Section 706(g) authorizes "appropriate" remedies, and "the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[5] Thus those purposes, to the extent that they are expressed in § 703(h), must be taken into account in framing appropriate remedies: § 703(h) is a reflection of Congress' specific intention that the Act not interfere with innocently motivated seniority systems.[6]

Opponents of Title VII, during the debates, pointed to the bill's silence respecting seniority systems as leaving at least ambiguous "Title VII's *impact on* existing collective bargained seniority rights," *id.* at 352 (emphasis added), and had predicted that the bill would "destroy" such rights, *id.* at 350. That warning led to an outpouring of responses from the bill's sponsors, quoted in *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1539-1540 (1982), that "the bill would not affect seniority at all;" "Title VII would have no effect on seniority rights existing at the time it takes effect;" Title

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[5] *See also, Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771 (1977).

[6] *See also, Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977); *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1539-1541 (1982).

VII would "have no effect on established seniority rights;" "seniority rights are in no way affected by the bill." As this Court has recognized, the sponsors' intent was that the bill would "protect . . . seniority systems," *id.*, 102 S.Ct. at 1540. Section 703(h) was added to confirm that intention, and the sponsors' statements following its addition to the bill "are to the effect that 'the Senate substitute bill expressly protects valid seniority systems'", *id.*[7]

The Congressional decision not to disturb the seniority status earned by employees except to the minimum extent necessary to vindicate rights of actual victims to rightful place within a seniority system, *Teamsters*, *supra*, 431 U.S. at 353-356, 371, is frustrated when earned seniority rights are subject to indiscriminate nullification just as surely as that decision would be thwarted by direct invalidation of seniority rights, as a Title VII violation, because of the impact of *bona fide* of seniority applications.

This Court's post-*Franks* seniority decisions confirm this view. In *Teamsters* v. *United States*, *supra*, the court therefore held that *only* those non-applicants who could prove that they would have applied for jobs but for the employer's discriminatory policy, *i.e.*, who "were *actual* victims of the company's discriminatory practices," 431 U.S. at 371-372, could be afforded retroactive seniority relief. More recently, in *American Tobacco*, the court re-emphasized that rightful place relief for victims is the limit of the inroad upon protection of seniority rights permitted at the remedy stage:

> Title VII does affect seniority rights, for *Franks* v. *Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority *to victims of unlawful discrimination*. However, Senator Clark . . . and other key proponents of the bill *intended that it have minimal im-*

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[7] *See*, United States' Brief at 13-22 and Equal Employment Advisory Council's Brief at 17-23.

pact on seniority systems. 102 S.Ct. at 1540 n.15, emphasis added.[8]

On this point, this case is analytically indistinguishable from *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The Court of Appeals, noting that § 8(d) is phrased in terms of violation, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected that reasoning:

> In reaching this conclusion the Court of Appeals held that § 8(d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8(d) defines collective bargaining and relates to a determination of *whether* a . . . violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U.S. App. D.C., at 348, 389 F.2d at 299. We may agree with the Court of

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[8] In *Ford Motor Co.* v. *E.E.O.C.*, ___ U.S. ___, 102 S.Ct. 3057 (1982), this Court rejected — as inconsistent with the remedial objectives of Title VII — the E.E.O.C.'s position that in order to toll the accrual of backpay an employer must not only offer reinstatement to one who claims to be a victim but must offer retroactive seniority as well. Recognizing that such a rule could lead to conferring retroactive seniority upon persons who ultimately were found not to be identifiable victims of discrimination, the court declared: "The rule . . . threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority." 102 S.Ct. at 3070. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 915, 102 S.Ct. 1127, 1136 (1982) (class-based seniority relief for identifiable victims is appropriate under § 706(g)).

> Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. 397 U.S. at 107-108 (emphasis in original).

The *H.K. Porter Co.* analysis is particularly apposite, for § 10(c), there construed, was the model for Title VII's remedial provision, § 706(g). *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419. Accord, *Ford Motor Co.*, v. *E.E.O.C.*, ___ U.S. ___, 102 S. Ct. 3057, 3062 n.8 (1982). Thus, while § 703(h) of Title VII, like § 8(d) of the NLRA, speaks to whether a violation has occurred, both provisions express a congressional policy which must preclude the fashioning of remedies inconsistent with that policy.[9]

While the congressional desire to protect seniority rights alone indicates that the *particular* quota remedy sought here would not be "appropriate" (as the remedy would modify a bona fide seniority system), there is independent evidence that Congress did not intend to authorize quota remedies under *any* circumstances (even where such remedies would not modify a seniority system). That evidence is set forth in the

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[9] The foregoing analysis also demonstrates respondents' error (at 51 n.9) in contending that the congressional hostility to governmentally-imposed quotas, reflected in § 703(j), has no relevance to determining appropriate remedies under § 706(g).

Amicus Curiae Brief of the AFL-CIO at 8-12. Note also, United States' Brief at 21-24. As respondents and amicus National Education Association (NEA) attempt to show the opposite, Local 718 takes this opportunity to respond.

Respondents and NEA offer no serious argument that the Congress that enacted Title VII in 1964 intended to empower courts to order racial quotas as "relief" in Title VII cases. Indeed, neither respondents nor the NEA dispute the showing that the 1964 Congress intended to deny the courts the power to grant such relief.[10] Rather, respondents and NEA contend that the 1972 Congress reversed the 1964 decision forbidding court-ordered quotas. Two arguments are advanced in support of this contention.

First, it is suggested that the addition to the first sentence of § 706(g) of the phrases "but is not limited to" and "or any other equitable relief as the court deems appropriate," should be read as authorizing courts to order racial quotas. Respondents' Brief at 53; NEA's Brief at 23-24. But neither respondents nor NEA point to a single word in the legislative history suggesting that this change was intended to permit court-ordered quotas. Indeed, the sole explanation of § 706(g), as amended, which is contained in the section-by-section analysis prepared by Senators Williams and Javits (118 Cong. Rec.

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[10] The AFL-CIO's Brief sets forth a series of unequivocal statements by the floor leaders of the Civil Rights Act of 1964 and a number of other supporters of the bill in both houses of Congress that Title VII does not empower courts to order racial quotas or preferences. AFL-CIO's Brief at 8-12. In the face of that demonstration, respondents nevertheless contend that: "The legislative history of the 1964 Civil Rights Act . . . reveals little specific consideration of the remedial powers of the federal courts." Respondents' Brief at 49 n.8. And the NEA, while acknowledging that "[t]here are statements in the legislative history of the 1964 Act that indicate an intention to bar the preferential hiring requirements even as a remedy for a proven violation," suggests that these statements by the sponsors of the Act should be ignored "in favor of constructions . . . more in keeping with the overall policy and purpose of the Act." NEA Brief at 20-21 n.12. But the statements of the Act's sponsors reflect what Congress intended to enact into law. And Congress' intent defines "the overall policy and purpose of the Act."

7166, 7168), states quite a different understanding of "appropriate relief":

> [T]he scope of relief under [§ 706(g)] of the Act is intended to make the *victims of unlawful discrimination whole*, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. (Emphasis added.)

See also, Franks v. *Bowman Transportation Co.*, 424 U.S. 747, 764 n.21, where this Court explained that the "added phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder."

It is also significant that the 1972 Congress did not amend the last sentence of § 706(g). Respondents (at 54-58) and the NEA (at 18-19) dismiss the last sentence of § 706(g) as irrelevant. Both contend that the sentence merely denies relief to those who were actually turned down for non-discriminatory reasons, and is inapplicable to those who, because they never applied, were never turned down. Yet the principal sponsors of the 1964 Act pointed to that sentence as the textual proof that the bill did not permit court ordered quotas.[11] Since the 1972 Congress did not amend the last sentence, and the intent of the 1964 Congress is unmistakable, it is that 1964 intent that controls. *Teamsters*, 431 U.S. at 354 n.39.

Second, lacking any basis in what Congress did and said for the argument that the 1972 Congress intended to legislate a reversal of its 1964 prohibition on court-ordered quotas, respondents and NEA contend that such a reversal was accomplished *sub silentio*. Respondents and NEA claim that at the

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[11] See AFL-CIO's Brief at 9-10, 11.

time the 1972 amendments were enacted there were judicial decisions upholding the use of court-ordered quotas. Respondents's Brief at 40; NEA's Brief at 21. They argue that these decisions, despite their inconsistency with the intent of the 1964 Congress, became the expression of the 1972 congressional will by virtue of a general statement made in the introduction to the section-by-section analysis cited above (118 Cong. Rec. at 7166). The full text of that introduction is as follows:

> This analysis explains the major provision of H.R. 1746, the Equal Employment Opportunity Act of 1972, as agreed to by the Conference Committee of the House and Senate on February 29, 1972. The explanation reflects the enforcement provisions of Title VII, as amended by the procedural and jurisdiction provisions of H.R. 1746, recommended by the Conference Committee.
>
> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Respondents and NEA err in this contention for the following reasons:

(a) This general statement is by its terms inapplicable to the construction of § 706(g). For Congress in its addition to the first sentence of § 706(g) "address[ed] itself" to the question of the appropriate remedy under Title VII. And, as discussed above, the section-by-section analysis itself "indicate[s]" the "intention" that "'rightful place' was the intended objective of Title VII and the relief accorded thereunder." (*Franks*, *supra*, 424 U.S. at 764 n.21.) In light of the 1964 Congress' clearly expressed purpose to bar court-ordered quotas, and the specific statement of the 1972 Congress in the section-by-section analysis as to the remedial objectives of § 706(g) (quoted *supra* at 11), the general introductory statement

would not constitute a congressional authorization of court-ordered quotas even if the lower-court decisions cited by respondents and NEA could be read as expressing a judicial consensus as of 1972 that Title VII permitted such quotas (and they should not be so read, *infra* at 15-7).

(b) It is basic that the concurrence of both houses of Congress is required to amend existing legislation. Congress cannot be deemed to have incorporated into a statute judicial interpretations of that statute when it is clear that either house of Congress understood and intended to retain the statute's original meaning. Matters then stand on the same footing when the statute reaches this Court for a definitive interpretation as if no amendment had occurred: there having been no agreement in a subsequent Congress to change the law, the intent of the Congress that enacted the statute originally continues to govern. *Accord*, *Teamsters*, *supra*, 431 U.S. at 354 n.39 ("It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls").

Here the House of Representatives, in the course of enacting the 1972 amendments to Title VII, made manifest its understanding that Title VII as it stood did not *and as amended* would not authorize court-ordered quotas.[12] Thus, no matter what the lower court law at that time showed, the House in 1972 legislated on the understanding that Title VII does not

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[12] See the extensive materials cited in the AFL-CIO's Brief at 16-22. Notwithstanding that showing, the NEA's Brief at 27 n.14, states: "There were no discussions on the floor of the House of Representatives of preferential remedies under Title VII." The NEA goes on to suggest that the will of the House is to be inferred from "the failure of the House to prohibit racial preferences under the Executive Order. . . ." *Id.* Again, the NEA's brief simply ignores the statements in the House distinguishing between the power of the OFCC to require racial preferences under the Executive Order and the power of courts to order such preferences under Title VII. *See*, AFL-CIO's Brief at 16-22; see particularly *id.* at 19-20. Similarly, respondents' brief ignores all of the pertinent legislative history in the House in 1972, citing instead to materials that do not address the issue of court-ordered quotas.

permit such quotas, and that understanding, which tracks the 1964 Congress' intent, governs interpretation of the Act.[13]

(c) Putting aside the House of Representatives' understanding in 1972 that court-imposed quota remedies are not available under Title VII, the cases, on which respondents and NEA rely, do not, as is claimed, constitute any uniform judicial endorsement of court-ordered quotas. For the proposition that "[p]rior to the passage of the 1972 act, Title VII had been held to authorize affirmative, non-victim specific relief," Respondents' Brief at 49, relies on *United States* v. *Ironworkers Local 86*, 315 F. Supp. 1202, 1247-1248 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Sheet Metal Workers Local 36*, 416 F.2d 123, 132-133 (8th Cir. 1969); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); *United States* v. *Local 38, IBEW*, 428 F.2d 144, 149-151 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).[14]

Each case cited by respondents was decided prior to *Griggs* v. *Duke Power Co.*, 402 U.S. 414, 430 (1971) (Title VII applies to "practices . . . neutral on their face . . . [which] operate to 'freeze' the status quo of prior discriminatory practices." The central issue in three cases was whether a court

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[13] While the intent of the House not to change the ban on court-ordered quotas enacted in 1964 is conclusive by itself, it is significant that in the Senate did not manifest a contrary intention. Respondents and the NEA point to statements made by Senators Javits and Williams in connection with one of the multitude of amendments submitted by Senator Ervin in the course of his filibuster. As is shown inthe AFL-CIO's Brief at 22-25, neither those statements, nor the vote on the amendment, can be taken as an expression by the Senate of its understanding of the current law respecting court-ordered quotas or of its intention to reverse the decision made in the 1964 Congress respecting quota remedies. The other materials from the Senate cited by respondents and the NEA do not even pertain to the question of court-ordered quotas.

[14] Amicus NEA advances the same contention, citing the same four cases and *United States* v. *Central Motor Lines, Inc.*, 325 F. Supp. 478 (W.D.N.C. 1970). NEA's Brief at 21. *Central Motor Lines* is simply a two page preliminary injunction and contains no legal ana' '.

could enjoin facially neutral practices (prior experience requirements or a nepotism rule) which perpetuated the effects of prior discrimination over opposition that the injunctions would to accord preferential treatment in violation of § 703(j) (experience requirements, *Sheet Metal Workers, supra, Local 38, IBEW, supra* and nepotism, *Vogler, supra*).

Neither *Sheet Metal Workers, supra* nor *Local 38, IBEW, supra* concerned "preferences" or "quotas" as those terms are now used. Indeed, the Eighth Circuit, in holding that an injunction banning an experience requirement did not violate § 703(j), made this disavowal: "In requiring the modifications, we impose no quotas, we grant no preferences." Its very next paragraph is introduced thusly: "[N]or do we deprive any non-Negro craftsman of bona fide seniority rights.[20]" That note 20 acknowledges that *bona fide* seniority systems are entitled to protection under Title VII by virtue of § 703(h).[15]

Vogler, supra, upheld an injunction striking down nepotism and prior experience as membership requirements and "ordered the development of objective membership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future union membership admissions. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminates) and directed continuance of chronological referrals for work, with alternating white and Negro referrals, *id.* In a brief cryptic passage near the end of its opinion, the Fifth Circuit simply states pending that development alternating referrals were required for "administrative reasons," *id.* at 1055.

The Ninth Circuit sustained an injunction in *Ironworkers, supra*, that contained compulsory numerical guidelines for

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[15] A leading law review note published in 1971 observed with respect to the remedy prescribed in *Sheet Metal Workers* that: "The principle of color blindness is maintained . . . . There was to be no unfairness to whites." But it emphasized that it called for no preferences, no quotas. Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L.Rev. 1109, 1147 (1971) (footnotes omitted).

minority admissions into apprentice programs against arguments that the injunctions violated § 703(j). The Ninth Circuit noted (and it was not presented with any seniority issues) the "only statutory limitation on the availability of [court-ordered] relief is the anti-preferential treatment provision of section 703(j)." 443 F.2d at 553. The Ninth Circuit, relying on *Vogler, supra*, rejected the appellant's contentions as to § 703(j) and states that the district's court's affirmative relief "did not establish a system of racial quotas or 'preferences' in violation of section 703(j). 443 F.2d at 554.

Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were approved, neither case endorsed Court ordered racial quotas in Title VII cases as such.[16]

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[16] Amicus NEA notes that some of these four decisions were cited and/or published in the legislative materials. NEA's Brief at 22, 26. But the only NEA cited item in which the meaning of these cases with respect to the issue of race-conscious remedies was discussed was the statement of Senator Javits at Leg. Hist. 1048. There Senator Javits described the *Ironworkers* case as one holding "that there was an affirmative duty for minority recruitment"; and he referred to a "decision . . . by Judge Bonsal in New York, in the Steamfitters case, [where] an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices". *Id.* But, Judge Bonsal had ordered that 169 minority steamfitters who were members of "Branch B" of a local union, who were "doing the same kind of work as members of the A branch" and who were "on the whole . . . as competent as A men", were entitled to be admitted into membership in the A branch. *United States* v. *Local 638, Steamfitters*, 337 F. Supp. 217, 219-220 (S.D.N.Y. Jan. 3, 1972). As to other potential candidates for membership, the order simply provided that the union "shall submit to the Court proposed objective qualifications and procedures . . . for admission of workers, regardless of race or national origin, to full journeyman status in the A Branch. . . ." *Id.* at 221. Senator Javits' vague description of the *Ironworkers* case, coupled with his reference to the *Local 638 Steamfitters* case which involved no racial preferences, hardly communicates the view that the decisional law was understood by Senator Javits, let alone the entire Senate, to permit court-ordered quotas under Title VII are permissible.

NEA also makes much of the decision in *Contractors Association* v. *Schultz*, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), upholding the Philadelphia Plan established pursuant to Executive Order 11246. See NEA's Brief at 21-22, 26. But as NEA acknowledges, that case

In short, as of 1972, the lower court law with respect to the permissibility of court-ordered quotas in Title VII cases was in an early and disorderly stage of development. The existing decisional law did not establish a clear rule that could justify an inference that the 1972 Congress, without ever expressly stating so, reversed the judgment made in the 1964 Congress not to authorize such quotas under Title VII especially considering the 1972 legislative materials and history.

IV. The Matter is Not Moot.

The August 7, 1981 order states at its fourth paragraph, (Petition For Writ of Certiorari, Local 718, at A29):

> In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

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merely held "that Section 703(j) was a limitation only on what could and could not be required under Title VII," rather than under the Executive Order. NEA's Brief at 21. See 442 F.2d at 172.

Finally, it is worth noting as well that as of 1972 other authorities looked in the opposite direction. Indeed, in the police case now before the Court, Judge Wyzanski had refused to grant a remedy embodying racial preferences, stating:

> [T]his court declines to follow plaintiffs' proposals for preferential hiring of these plaintiffs or other black and Spanish-surnamed persons. Quite apart from such constitutional problems as would be presented . . ., this court sees no reason to put blacks, for example, ahead of Indians, or Chinese, or whites who are in a comparable plight.

Castro v. *Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971). Judge Wyzanski's decision had not been reviewed by the Court of Appeals at the time Congress acted in 1972. *Accord*, *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (§§ 1981 and 1983 action; minority preferences are proscribed racial discrimination).

Senior firefighters' appeals to the Civil Service Commission (CSC) are still pending, Under the orders explicit terms, CSC cannot "disapprov[e]" or "invalidat[e]" their terminations on statutory seniority grounds. Instead, in the CSC proceedings and in any ensuing appeals, the city of Boston can contest the firefighters' seniority claims on the ground that a valid federal order set aside their seniority. Senior firefighter back pay claims are forestalled unless the federal order is reversed. Such collateral legal consequences disadvantaging senior firefighters justify this Court's addressing the merits. *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968). *See*, United States' Brief at 9 n.8.

Enactment of 1982 Mass. Acts, c. 190, § 25, reproduced at Respondent's Brief, App. A., does not moot this case. Although that omnibus bill directed reinstatement of available officers and protects them from termination again only "for lack of funds," the reinstated officers are still vulnerable to layoffs for other reasons such as departmental reorganization and reduced manpower needs, contrary to respondents' assertions at 65. The minimum staffing levels stated in § 25 expire on June 30, 1983 and in any event newly hired officers in both departments (Respondent's Brief at 14), are exposed to fiscally based layoffs. "Proposition 2 1/2", the tax limitation initiative, 1980 Mass. Acts, c. 580, has continuing effect. Petition For Certiorari, No. 82-259, at 29 n.9. In light of ongoing economic and fiscal concerns, no "assurance that 'there is no reasonable expectation . . .'" of recurrence exists[17] and the 1982 statutory reinstatements and terms are neither "interim relief or events [that] completely and irrevocably eradicated the effects . . ." of the August 7, 1981 order. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

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[17] The omnibus legislation, at its § 30, authorized a "user fee" to cover the costs of "augmented fire service" and to "assure [Boston's] continued ability to provide" such service. This specific "user fee" has been found unconstitutional by the Massachusetts Superior Court Department and its enforcement is subject to an injunction. Hence millions of dollars of expected revenues from this source are in doubt. The Boston Globe, April 2, 1983, p.13.

The complaints and many earlier decrees in both the fire and police cases were state wide in scope. The tax limitation initiative and its continued operation can lead to layoffs in other cities subject to the seniority statute and the court orders, and in this way, this dispute as to the lawfulness of court orders that surpress a valid seniority statute is fully "capable of repetition" while evading review unless this Court addresses the merits. *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 547 (1976).

The legality of a seniority suppression to maintain minority hiring gains pursuant to federal court orders in an important issue of substantial public interest. The real possibility, if not inevitability, of future orders impacting on CSC and on Boston public safety personnel, "militates against a mootness conclusion." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Any deposition that fails to address the merits of the issues leaves the court's decision below as a "pertinent statement of the governing law, even if that decision is not directly binding.[10]" *County of Los Angeles, supra* at 646 (opinion of Powell, J. dissenting) (note 10 points out that unless the views of the court below on merits are reversed, these views are "persuasive authority if not the governing law" in the circuit).

Respondents and their amici have not satisfied their "heavy" burden. *W.T. Grant Co., supra* 345 U.S. at 633, in their mootness contentions.

Conclusion.

For the reasons set forth above and in Local 718's opening brief, the decision and judgment of the First Circuit should be reversed with directions that judgment be entered denying plaintiff's motion to modify prior remedial orders.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

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Sosna v. Iowa, 419 U.S. 393 (1975) 6, 25n

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NOS. 82-185, 82-246, 82-259

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

REPLY BRIEF FOR THE STATE PETITIONERS

Pursuant to Supreme Court Rules 34.4 and 35.3, Petitioners Massachusetts Personnel Administrator and Civil Service Commission file this brief in reply to the brief on the merits filed by the respondents.

I. THESE CASES ARE NOT MOOT BECAUSE THE ORDERS OF THE DISTRICT COURT HAVE PERMANENT EFFECT AND CIRCUMSCRIBE THE STATE PETITIONERS' ADJUDICATION OF PENDING ADMINISTRATIVE APPEALS.

Contrary to the suggestions of respondents[1/] and amici supporting respondents,[2/] these cases are not moot as to the State petitioners. A live case or controversy under Article III of the United States Constitution remains because (1) the orders of the district

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1/ Brief at 65-68.

2/ Brief of Officers for Justice Amici at 4; Brief of NOW Amici at 5-20; Brief of NAACP Legal Defense Fund at 3-18. Amici supporting respondents demonstrate some cacophony on the issue, however. While the three briefs cited above suggest that the case is moot, the brief of amici led by the National Bar Association argues that the case is not moot because Mass. St. 1982, c. 190 only applies to those individuals who lost jobs in 1981, "while the consent decree as modified remains in force for an indeterminate period." Brief at 10 n. 4.

(footnote continued)

court by their terms carry permanent effect; (2) the orders currently circumscribe the pending Massachusetts Civil Service Commission adjudication of terminated police and fire officers' administrative appeals; and (3) even if the district court's orders have expired by their terms, the fact that the underlying judgments in the police and fire cases will remain in force and will not be vacated as moot insures that the State petitioners will be the subjects of future, adverse application of the

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(footnote continued)

The United States argues that the case is not moot because (1) the orders "permanently" enjoin layoffs in any manner that would reduce percentages of minority officers, and (2) the Court's "resolution of the issue" in this case "could . . . be crucial to the disposition" of laid-off officers' administrative appeals. Brief at 9 n. 8.

specific judgment before this Court on appeal.

A brief discussion of the basis for respondents' suggestion of mootness precedes successive consideration of each of these points.

A. The Provisions of Mass. St. 1982, ch. 190.

The factual basis for respondents' suggestion of mootness is narrow. Respondents exclusively rely on the combination of state legislation passed June 8, 1982, and the rehiring of Boston police and firefighters which followed. The legislation, 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.)[3/] became effective and the officers were re-

3/ The text of Mass. St. 1982, ch. 190, §25 appears at pp. 1a-2a of the appendix to this reply brief.

hired subsequent to entry of the orders of the district court and the judgment of the United States Court of Appeals for the First Circuit affirming those orders, but before this Court granted certiorari on November 1, 1982.

Massachusetts St. 1982, ch. 190 significantly improved Boston's financial condition by enabling the City to institute new methods of revenue collection. In addition, the Act compelled the reinstatement of all police and fire officers terminated for lack of funds after July 1, 1981, and prohibited termination of those same officers for lack of funds in the future. Mass. St. 1982, ch. 190, §25. The Act also required that through June 30, 1983 the City of Boston maintain minimum staffing levels in its police and fire departments. Respondents

and amici argue that the rehiring of police and fire officers under the terms of the state legislation moot the cases currently before the Court.

B. The Cases are Not Moot Because The District Court's Orders By Their Terms Carry Permanent Effect.

The Court's jurisdiction under Art. III, §2 of the Constitution extends only to actual cases and controversies. Sosna v. Iowa, 419 U.S. 393, 402 (1975). A case or controversy becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam), quoting United States Parole Commission, v. Geraghty, 445 U.S. 388, 396 (1980) and Powell v. McCormack, 395

U.S. 486, 496 (1969). "[J]urisdiction, properly acquired, may abate if the case becomes moot because

> (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> (2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . .

County of Los Angeles, v. Davis, 440 U.S. 625, 631 (1979). The burden of demonstrating mootness "is a heavy one." Id. citing United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). Respondents fail to meet that burden because they have not demonstrated that "events have completely and irrevocably eradicated the effects" of the district court's orders on the State petitioners'

future compliance with the consent decrees and state law. County of Los Angeles, 440 U.S. at 631. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122-125 (1974). Against the weight of express language in the district court orders and opinion, the respondents and amici contend that the orders have expired by their terms and their expiration moots the cases before this Court. Brief at 68. Brief of NOW Amici at 17 n. 6. The terms of the district court's orders and its opinion belie these contentions.

The orders expressly enjoin the "Commissioner of Police of the City of Boston . . . from reducing, pursuant to any departmental or city program of reductions in force . . . the percentage of black and Spanish surnamed . . .

police officers." Castro v. Beecher, 522 F. Supp. 873, 878 (D. Mass. 1981) (P.A. 65-66) (emphasis added). The orders also mandate the establishment and use of separate seniority lists "in implementing any program of reductions in force on account of lack of funds or abolition of positions." 522 F.Supp. at 877-88 (P.A. 65-66) (emphasis added).

The orders expressly impose permanent prohibitions and affirmative duties on the State petitioners as well. The orders restrain the Massachusetts Civil Service Commission, in its adjudication of police and fire officer termination appeals, "from disapproving, invalidating, or interfering with . . . termination[s]" on the basis of the order of layoff prescribed by the district court.

522 F. Supp. at 878. (P.A. 68) In addition, the orders prospectively require the Massachusetts Personnel Administrator to create reinstatement lists "[f]or the purpose of continuing the implementation of [the district] court's prior orders" and to supervise reinstatement "so that the percentage of black and Spanish-surnamed officers does not fall below 11.7 percent." 522 F. Supp. at 878. (P.A. 68-69)

Thus the terms of the district court's orders have not been "fully and irrevocably carried out." Contrast University of Texas v. Camenisch, 451 U.S. 390, 398 (1981). The orders apply to "any" program of reduction in force; they circumscribe the adjudication of

state administrative appeals; and they prospectively require state and local officials to supervise the hiring and termination of public safety personnel so as to preserve percentages of minority officers. The plain language of the orders sustains their effect and preserves the controversy before this Court.

The opinion of the district court further supports the view that its orders carry permanent effect. The district court concluded, based on its interpretation of the court of appeals' 1973 and 1974 decisions in these cases, that any layoff program which "resulted" in a reduction of minority percentages would warrant prospective modification of the consent decrees and suspension of state

law. 522 F. Supp. at 877. (P.A. 86-87)[4/] The district court opinion also states:

> [I]f anything similar to Proposition 2 1/2 had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

522 F. Supp. at 877. (P.A. 87-88) This implicit "allowance" for the "maintenance" of minority percentages, which the district court divined from between the lines of previous decrees, works a permanent, not temporary modification of

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4/ Indeed, amici led by the National Bar Association refer to petitioners' appeal as an "assault on the modified consent decree," Brief at 15 (emphasis added), thus implying permanent, prospective effect.

those decrees. According to the district court, "hypothetically ongoing terminations" at the time of entry of the decrees would have prompted the parties to "fashion" the decrees so as to preserve minority percentages. Id. The court leaves no doubt that, despite the absence of language applicable to layoffs, its interpretation of the intentions of the parties would justify modification of the decrees and suspension of state law to address any future "hypothetical terminations" that threatened to reduce minority percentages.

Respondents suggestion that the "situation called for" no permanent order and that they "sought none," Brief at 68, confuses the factual predicate for the orders with their legal effect.

The mootness question turns on the latter. As legal grounds for their motion to modify prior orders respondents invoked the authority of the district court to "modify ongoing relief." See Brief at 17. The district court based its "modification" on what it determined to be the "nature" and "objective" of the remedial decrees. 522 F. Supp. at 877 (P.A. 87-88) The ongoing supervision of the consent decrees by the district court, so crucial to respondents' request for modification of prior remedial orders in these cases, likewise determined the scope of the modification secured. Respondents concede that the modification orders "were a part" of the "ongoing remedial programs." Brief at 68. The

admission concedes the point. The language of the orders and the opinion speak in permanent, prospective terms consistent with the respondents' conception of the district court's supervisory powers. The orders' permanent effects thus sustain the cases before this Court. Super Tire Engineering Co. v. McCorkle, 416 U.S. at 122-125.

C. The Orders Currently Circumscribe The Pending Adjudication Of Police And Fire Officers' Administrative Appeals.

The August 7, 1981 orders of the district court restrain the Massachusetts Civil Service Commission (the Commission), in its adjudication of administrative appeals taken by terminated police and fire officers, "from disap-

proving, invalidating, or interfering with . . . termination[s]" on the basis of the order of layoff prescribed by the district court. 522 F. Supp. at 878. The appeals of officers terminated in the summer of 1981, which include claims for back pay, are currently pending before the Commission. Pursuant to Massachusetts General Laws Ann. ch. 31, §43 (West)[5/] the Commission "shall affirm the action of the appointing authority if it finds that [the termination] was justified." The laid-off officers claim, inter alia, that their terminations were not justified because

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5/ As appearing in Mass. St. 1978, ch. 393, §11. Section 43 was rewritten by Mass. St. 1981, ch. 767, §20. The amended version does not govern the terminated officers' appeals. See Mass. St. 1981, ch. 767, §29(4).

of violation of their "seniority rights." Petition of Boston Firefighters Union at 17. By their terms the district court's orders preclude administrative consideration of this issue or application of Mass. Gen. Laws Ann. ch. 31, §39, to the appeals.

Respondents argue, nonetheless, that the issue before the Commission is not identical to that before the Court and therefore any decision by the Court "will not dispose" of the administrative claims nor relieve "unremedied" injury. Brief at 66. In their zeal to distinguish the issues before the two tribunals, and thereby demonstrate the mootness of the Supreme Court appeal, respondents overlook the "unremedied" injury to State officials: the circumscription of the

Commission's jurisdiction by the terms of the district court orders. The orders restrain the Commission from "disapproving" or "invalidating" the terminations on the basis of the order of layoff. By precluding consideration of the seniority question, the orders prospectively suspend application of §39 and impermissibly and permanently foreclose a legitimate area of Commission inquiry.

Respondents' focus on the "dispositive effect" of a Supreme Court ruling on the merits of the administrative appeals is misdirected. State petitioners do not argue that the "dispositive effect" of a Supreme Court decision on the pending administrative appeals sustains the controversy before the Court. Rather, they argue that the

orders currently restrict full adjudication of the appeals according to state law, that those restrictions sustain a live controversy before this Court, and that reversal of the orders is required to free the State petitioners from the orders' effects.[6/]

D. The Expiration of the District Court's Orders Would Not Moot This Case.

Even if the district court's August 7, 1981, orders have expired by their

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6/ For the reasons set forth in Section I, D, infra, an order simply vacating the district court orders as moot, see, e.g., United States v. Munsingwear, 340 U.S. 36, 39 (1950), will not relieve the State petitioners from all of their "unremedied" injuries. Brief of Respondents at 66.

terms, and do not circumscribe pending adjudications by the Massachusetts Civil Service Commission, those circumstances would not moot the cases before this Court. Since the State petitioners' obligations under the consent decrees entered in these cases continue unabated and the challenged orders will adversely affect compliance, the Court retains jurisdiction over the present dispute and reversal of the lower court orders is required.

The Court has previously held that where a lower court decision "continues to play a substantial role in the response of [government] officials," the Court's jurisdiction does not cease. Carroll v. Princess Anne, 393 U.S. 175, 178 (1969) (Carroll). Despite the

expiration of lower court orders in Carroll the Court found that the "underlying question" of the case "persist[ed]" and was "agitated" by a "continuing program" of the petitioners. Id. citing Bus Employees v. Missouri, 374 U.S. 74, 78 (1963)(underlying labor dispute remained unresolved).

The Ninth Circuit relied on Carroll to support a similar conclusion in Brown v. Board of Bar Examiners of Nevada, 623 F.2d 605, 608-609 (9th Cir. 1980). Brown held that the State's appeal was not moot because the "underlying dispute" in the case concerning the district court's jurisdiction survived, despite the fact that the plaintiff "obtained [her] particular equitable relief[.]" The State's appeal presented a live case or controversy because it concerned

> an ongoing issue of federal court jurisdiction and of federal-state relationships, the consideration of which should not be defeated by a short term order which state officials are constrained to obey rather than be held in contempt.

Id. at 609.7/

Both Carroll and Brown address circumstances similar to those presented by this case: the expiration of lower court orders challenged on appeal by those who have complied. The cases enunciate a rule which squarely applies to this controversy: where a party

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7/ See also Modern Plastics Corporation v. McCulloch, 400 F.2d 14, 16-17 (6th Cir. 1968)(NLRB's appeal from district court injunction not mooted by passage of date for election at issue where further efforts of NLRB "would be frustrated by the issuance of another injunction.")

seeking to overturn judicial orders may suffer present or future adverse effects from the entry of the orders, its appeal from them is not moot. "It may be said that the adverse effects give the challenger, who otherwise has nothing to gain, a sufficient interest in the litigation." Note, "Mootness on Appeal," 83 Harv. L. Rev. 1672, 1680 (1970).[8/]

The orders of the district court and the judgment of the court of appeals in these cases will continue to affect the State petitioners' compliance with the consent decrees and Massachusetts civil service law. The nature of these cases compels this conclusion. Respondents

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8/ Cf. Sibron v. New York, 392 U.S. 40, 57 (1968)(appeal from criminal conviction is moot only where there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction).

brought these cases as class actions. Castro v. Beecher, 334 F. Supp. 930, 934 (D. Mass. 1971). Boston Chapter, NAACP v. Beecher, 371 F. Supp. 507, 510 (D. Mass. 1974). The consent decrees entered in the police and fire cases have prospective, state-wide application. See Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 967-970 (1st Cir. 1982), and earlier decisions cited therein. The police and fire "cases" therefore possess independent, Article III identities distinct from those created by the August 7, 1981 orders. The lower court orders, even if vacated as moot,[9/] would un-

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9/ See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("established" practice of Court in moot case "to reverse or vacate the judgment below and remand with a direction to dismiss").

doubtedly serve as the legal basis for entry of subsequent orders in these cases enjoining application of Mass. Gen. Laws ch. 31, §39 to future layoffs in the cities and towns of Massachusetts covered by the decrees.[10/] The State petitioners are not and will not be free to apply §39 to future layoffs with impunity; for this reason they will continue to suffer an adverse effect from the lower court decisions.

10/ Accordingly, unlike the petitioner in De Funis v. Odegaard, 416 U.S. 312, 319 (1974), or the appellee in Brown, respondents and their class retain a "live" interest in the resolution of the controversy before the Court because as a class, they will continue to seek and to hold public safety positions throughout Massachusetts. Cf. Sosna v. Iowa, 419 U.S. 393, 399-402 (1975)(vitality of case sustained by existence and separate "legal status" of certified class).

Vacating the lower court orders as moot will not relieve petitioners' injury. The practice approved in Munsingwear "eliminates" judgments. Id. at 40. "[I]t is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Id. at 41. The parties in the cases before the Court, however, stand on different footing than the parties in Munsingwear. The State petitioners remain parties to ongoing proceedings before the district court. The consent decrees binding state officials will not be vacated as moot. Under these circumstances, the adverse effects of the lower court orders transcend their stare decisis or res judicata effects. While those effects may be

vitiated by vacating the orders as moot, the principle established by the lower court decisions at issue will not be vacated and may serve as the basis for further, adverse action against the State petitioners in the ongoing cases.

> Although a decision vacating a judgment [as moot] necessarily prevents the opinion of the lower court from being the law of the case . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . [c]ircuit.

County of Los Angeles v. Davis, 440 U.S. 625, 646 n. 10 (Powell, J., dissenting). As long as a complaining party on appeal demonstrates the fact or possibility of adverse effects flowing from the lower court decision, its appeal is not moot.

Where Massachusetts officials remain bound by judgments in both the "police" and "fire" cases which impose prospective, statewide duties, their "cases" remain "live" and their challenge to the district court's orders is not moot.[11/] As long as the underlying police and fire case judgments remain in force, the State petitioners' injury cannot be

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11/ This conclusion - that the cases live - is "particularly appropriate in the context of an injunction, where proper procedure is to seek judicial review rather than to risk contempt." Brown, 623 F.2d at 609. See Carroll, 393 U.S. at 179-180. The conclusion is compelled where the injunctive effect of the district court's orders precludes compliance with a presumptively valid state law. Brown, 623 F.2d at 609. The Massachusetts officials who complied under protest with federal orders should not be penalized for following the appropriate avenues of relief from those orders.

remedied by vacating the lower courts' orders as moot. Their interest in reversing those orders and removing the restraints on their future administration of the state civil service law generally and the consent decrees particularly creates a sufficiently live controversy for adjudication by this Court.

II. THE COURT'S RECENT DECISION IN EEOC v. WYOMING DOES NOT UNDERMINE ARGUMENTS PREVIOUSLY MADE BY THE STATE PETITIONERS.

E.E.O.C. v. Wyoming, ___ U.S. ____, 51 LW 4219 (March 2, 1983) does not undermine the State petitioners' invocation of principles of federalism embodied in the Tenth Amendment for several reasons. First, the State petitioners rely on principles of federalism applied by the Court to the exercise of the federal

equity power generally, see Hills v. Gautreaux, 425 U.S. 284, 293 (1976), not solely on a literal application of the terms of the Tenth Amendment. E.E.O.C. v. Wyoming does not relieve a federal court from its duty to temper equitable relief with concerns for the proper balance between state and federal power. Second, under the terms of the tripartite test established by Hodel v. Virginia Surface Mining, 452 U.S. 264, 287-288 (1981) and applied in E.E.O.C. v. Wyoming, the "degree" of intrusion into the State's ability to structure its integral operations in these cases surpasses the impairment found in E.E.O.C. and equals that found in National League of Cities v. Usery, 426 U.S. 833 (1976).

Finally, the E.E.O.C. dissenters observed that "Congress may act [under the Fourteenth Amendment] only where a violation lurks." E.E.O.C. v. Wyoming, 51 LW at 4228. This concern echoes the State petitioners' protest in these cases that the federal court orders violate principles of federalism because they extend far beyond the scope of any constitutional violation to suspension of a valid state law.

CONCLUSION

For all of the above reasons and for the reasons set forth in the State petitioners' initial brief, the Court should proceed to the merits of these cases and reverse the judgment of the First Circuit and the orders of the district court.

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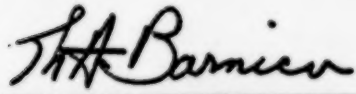

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Dated: April 8, 1983

APPENDIX A

Massachusetts Acts of 1982

Chapter 190

AN ACT Establishing the City of Boston Funding Loan Act of Nineteen Hundred and Eighty-Two And The Massachusetts Convention Center Authority.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first, nineteen hundred and eighty-one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth,

nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in injured leave under the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

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Nos. 82-185, 82-246, 82-259

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
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RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138 (E.D. Pa. 1977) 18n

Equal Emp. Opp. Com'n v. American Tel. & Tel. Co., 419 F. Supp. 1022 (E.D. Pa. 1974) 18n

Guardians Ass'n of New York City v. Civil Serv., 633 F.2d 232 (2d Cir. 1980) 18n

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Act of 1817 Vol. 7 (1840) 6n

Laws of South Carolina, 1865 13n

Virginia Vagrant Act of 1866 11n

Cong. Globe,
38th Congress, 1st Sess. (April 7, 1864) 10n
2d Sess. (January 6, 1865) 9n
2d Sess. (January 28, 1865) 10n

General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen, No. 3, 38th Congress, 1st Sess. 10n

House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864 10n

Joint Committee on Reconstruction, 39th Congress, Report, Part III, (Washington, D.C., 1966; reissued New York, 1970) 13n

Senate Executive Document, No. 6, 39th Cong., 2d Sess. (1866) 13n

Senate Executive Documents, Final Report of the American Freedmen's Inquiry Commission to the Secretary of War, No. 53, 38th Congress, 1st Sess. (1864) 10n

Senate Executive Documents, Preliminary Report Touching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission, No. 53 38th Congress, 1st Sess. 10n

MISCELLANEOUS.

G. Bentley, A History of the Freedmen's Bureau (1st ed. 1955) 10n, 13n

Berlin, Slaves without Masters (1st ed. 1974) 5n

S. Campbell, The Slave Catchers (1972) 4n

W.E.B. DuBois, Black Reconstruction (1935) 4n

L. Dunbar, "Toward Equality, Toward A More Perfect Union," in National Urban League, The State of Black America 1982 (1982) 24n

J.H. Franklin, From Slavery to Freedom: A History of American Negroes (2d ed. 1956) 9n

J.H. Franklin, The Militant South 1800-61 (1956) 8n

H. Gutman, Black Family in Slavery and Freedom (1977) 4n

V. Harding, There is a River (1982) 4n

A.L. Higginbotham, In the Matter of Color (1978) 8

R. Higgs, Competition and Coercion; Blacks in the American Economy, 1865-1914 (1st ed. 1977) 4n, 13n

H. Hill, "Race and Labor," The Journal of Intergroup Relations, vol. X, No. 1 (1982) 16n

J. Johnston, Race Relations in Virginia and Miscegenation in the South 1776-1860 (1st ed. 1970) 6n

W. Jordan, White over Black: American Attitudes Toward the Negro, 1550-1812 (1st ed. 1968) 6n

A. Kinoy, The Constitutional Rights of Negro Freedom, 21 Rutgers L. Rev. 387 (1967) 19n

A. Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company, 22 Rutgers L. Rev. 537 (1968) 19n, 23

Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery (1979) 9n, 14n

McFeeley, Unfinished Business: The Freedmen's Bureau and Federal Action in Race Relations, Key Issues in the Afro-American Experience, Vol. II (Huggins, Kilsond Fox ed. 1971) 10n

W. McFeeley, Yankee Stepfather: General O.O. Howard and the Freedmen (1968) 10n

E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1st ed. 1880) 12n

J. Mollenkopf, "The Crisis of the Public Sector in America's Cities", Essays on the Political Economy of Urban America with Special Reference to New York, R. Alcaly and D. Mermelstein (Eds. 1977) 16n

M. Mooney, Slavery in Tennessee (1957) 8n

G. Myrdal, An American v. Dilemma (Harper & Row ed. 1962) 11n

National Advisory Commission on Civil Disorders, Report (Bantam ed. 1968) 17n

National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime (GPO 1973) 17n

National Commission on the Causes and Prevention of Violence, Violence in America (Bantam ed. 1969) 17n

O. Patterson, Slavery and Social Death (1982) 4n

President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (GPO 1967) 16n

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (GPO 1967) 17n

Report of the Task Force on Disorders and Terrorism (GPO 1976) 17n

The Challenge of Crime in a Free Society (GPO 1967) 17n

To Establish Justice and Insure Domestic Tranquility (Bantam ed. 1970) 17n

W. Rose, Rehearsal for Reconstruction: The Port Royal Experiment (1st ed. 1965) 10n

C. Schurz, Report on the Condition of the South (1969) 13n, 14n

J. Scott, Hard Trials on My Way: Slavery and the Struggle Against It 1800-60 (1974) 8n

J. Scott, The Origins and Development of the KKK As A Badge of Slavery (Jan. 1981) 8

K. Stampp, The Peculiar Institution: Slavery in the Antebellum South (1956) 8n

J.G. Taylor, Negro Slavery in Louisiana (1963) 8n

J.T. Trowbridge, The South: A Tour of its Battlefields and Ruined Cities (1969) 15

United States Commission on Civil Rights, A National Not a Special Interest (1981) 16

V. Wharton, The Negro in Mississippi: 1865-1890 (1965) 13n

T.B. Wilson, The Black Codes of the South (1st ed. 1952) 11n

P. Wood, Black Majority: Negroes in Colonial South Carolina From 1670 Through The Stono Rebellion (1st ed. 1974) 6n

Nos. 82-185, 82-246, 82-259

In the
Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,

v.

PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,

v.

BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief Amici Curiae of The Affirmative Action Coordinating Center; The National Conference of Black Lawyers; The National Lawyer's Guild; The Center for Constitutional Rights

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Consent of Parties.

Amici Curiae file this brief with the consent of all the parties in support of the position advanced by the petitioners. Letters of consent have been filed with the Clerk of this Court.

Interest of Amici Curiae.

The thirty-six organizations joining in this brief as *amici curiae* (see appendix) represent many sections of American society with diverse interests. They share a mutual concern that the Court use the decision in this case to advance the commitment to rid our nation of the devastation of racial discrimination and race hatred. They are aware of the difficulty of this task.

These groups share an understanding that the continued exclusion of Blacks and other minorities from meaningful political and economic participation in public safety agencies is a legacy of slavery and racial discrimination.

Amici all recognize the importance in preserving seniority. They believe, however, that the Constitutional mandate to remove the badges and incidents of slavery must take precedence in this conflict.

Introduction and Summary of Argument.

The pursuit of racial equality in this country is at the crossroads again. In the fifth case in as many terms, this Court is called upon to chart the proper course. Either this Court will affirm the decision below (as *Amici* will strongly urge herein) and move the country forward toward racial equality, or this Court will reverse the decision below and catapult a return to an earlier era.

In this case, Petitioners seek the Court's assistance to eliminate the benefits of court ordered race conscious affirmative action designed to eradicate continuing vestiges of American slavery. They suggest that this country cannot afford to fulfill its constitutional mandate. *Amici* are not unaware that the

potential costs in affirming this case may be high. The time honored principle of seniority and its benefits are acknowledged openly by *Amici*. However, we believe that the costs of reversal are much higher. The social and political consequences of a retreat from the present course may very well cast a permanent shadow of racial inequality over this nation.

The narrow arguments advanced by Petitioners ignore or minimize the pressing urgency to fulfill the promises of the Thirteenth Amendment. The well-documented, gross exclusion of Blacks and other minorities from the public safety agencies in this country is one of the badges and incidents that has survived slavery and continues to perpetuate second class citizenship. The lower district court's modification of prior remedial orders designed to preserve meaningful participation by Blacks and other minorities in the Boston police and fire departments was well within the remedial flexibility that courts must enjoy when seeking to implement the mandate of the Thirteenth Amendment.

Argument.

I. The District Court's Modification of Prior Remedial Decrees was an Appropriate Exercise of Judicial Power Pursuant to the Thirteenth Amendment Mandate to Eradicate the Badges and Incidents of Slavery.

The Thirteenth Amendment commands the eradication of all forms of slavery and involuntary servitude, including all badges and incidents. Whenever a relationship with slavery is found, the Amendment provides more than ample power for ameliorating existing racial disparities. In the instant case,

that relationship is clear. Even a cursory examination of American history establishes the past and current exclusion of Blacks from public safety departments. This exclusion from meaningful or real participation in the principal government institutions for the security of person and property is a badge and incident of slavery. The Thirteenth Amendment required the Court's modification.

A. *Government Law Enforcement was an Integral Aspect of the Institution of Slavery.*

An effective system of human bondage must severely constrain or eliminate competitive economic opportunities for members of the enslaved group. The American system of slavery was maintained by virtually total exclusion of Blacks from independent participation in the economic mainstream.[1]

The law was clear. Slaves were property.[2] State laws collectively denied them any opportunity to own,[3] inherit,[4] or

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[1] O. Patterson, Slavery and Social Death (1982); V. Harding, There is a River (1982); H. Gutman, Black Family in Slavery and Freedom (1977); S. Campbell, The Slave Catchers (1972); Higgs, Competition and Coercion: Blacks in the American Economy 1865-1914 (1977); W.E.B. DuBois, Black Reconstruction (1935).

[2] The slave codes of several states expressly conferred upon slaves the status of property. In Louisiana, slaves were considered to be real estate and as such subject to being mortgaged. Act of 1806 (Black Code) Laws of Louisiana, at 101-102 (1806). Alabama and South Carolina, however, recognized slaves to be chattel property. Act of 1852, Code of Alabama, at 390 (1852); Act of 1740, Statutes at Large for South Carolina, Vol. 7, at 397 (1825). The slave as property had no legal rights to possess anything, real or personal. The master had full rights to sell him, dispose of his person, his industry and his labor. The slave could not possess nor acquire anything that did not belong to his master.

The master's right to free his slaves shrank as slavery expanded. Manumission had been the primary source of free Negro increase during the post-Revolutionary decades, and Southern legislators worked to curb or abolish the practice. During the nineteenth century, lawmakers dismantled the last

remnants of the liberal manumission policies of the earlier era. The older seaboard states added restrictions to their manumission statutes, and the newer states of the Southwest enacted almost prohibitory regulations so that even the few masters who desired to liberate their slaves found it increasingly difficult. By the mid-1830's, most Southern states required slaveowners to get judicial or legislative permission to free their slaves and demanded that newly liberated bondsmen leave the state upon receiving their freedom. Those few states which still allowed slaveowners to emancipate their slaves also stipulated that manumitted Blacks migrate or risk being forcibly deported or re-enslaved. Legislators further discouraged emancipation by requiring masters to remove freed Negroes and by making those manumitted liable to seizure for unpaid debts even after emancipation. Berlin, Slaves Without Masters, (1st ed. 1974) at 138.

[3]No slave can own property, and any property purchased or held by a slave, not claimed by the master or owner, must be sold by order of any justice of the peace; one half the proceeds of the sale, after the payment of cost and necessary expenses to be paid to the informer, and the residue to the county treasury. Act of 1852, Code of Alabama, Sec. 1018 (1852).

[N]o person . . . shall suffer or allow any of his or their slaves to plant for themselves any corn, peas or rice, or to keep for themselves any stock of hogs, cattle or horses, under the penalty of twenty pounds current money . . . for every slave so suffered . . . the said penalty to be recovered . . . half to be paid to him or them who will inform and sue for same . . . Act of 1714, Statutes at Large of South Carolina, Vol. 7, at 368 (1840).

[4]The alienation between slaves and property was made complete by prohibiting slaves to acquire or dispose of property through inheritance.

> All free persons, even minors, lunatics, persons of insane mind and the like may transmit their estates and *ab intestato* inherit from others. Slaves alone are incapable of either. Act of 1825, Louisiana Civil Code, Art. 945 (1825).
>
> Every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void. Act of 1841, Statutes at Large of South Carolina, Vol. 11, at 169 (1873).

otherwise acquire,[5] personal property or real estate. Nor were they able to acquire marketable skills through gainful employment in trade or commerce.[6]

Free Blacks also were seldom as free as whites. Property and special qualifications were barriers to general participation in the vote by free Blacks. Most were subjected to special jurisdiction in the courts, often without the right to a jury trial. Free Blacks also often were restricted in their personal movements, subject to travel with passes.

This complete economic subjugation was enforced by the enactment of exclusionary laws and by actual domination and control. Organized violence in a variety of forms was used to

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[5] State laws imposing criminal sanctions for interracial marriage were not ruled unconstitutional until *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) and *Loving* v. *Virginia*, 388 U.S. 1 (1967). These laws had the effect of precluding Blacks from obtaining property through marriage. *See* J. Johnston, Race Relations in Virginia and Miscegenation in the South 1776-1860 at 165 *et seq.* (1st ed. 1970); W. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812, at 136-178 (1st ed. 1968); P. Wood, Black Majority: Negroes in Colonial South Carolina From 1670 Through the Stono Rebellion, at 98-100, 233-6 (1st ed. 1974).

[6] Section 13. No owner of slaves shall hire his slaves to themselves, under the penalty of a fine of five and twenty dollars for every offense. Act of 1806 (Black Code) Lislet's Digest to Laws of Louisiana, Sec. 13 (1828).

[I]t shall be altogether unlawful for any person or persons to hire any male slave or slaves, his or their time; and in cases any male slave or slaves be so permitted by their owners, to hire out their own time, labor or service, the said slave or slaves shall be liable to seizure and forfeiture . . . Act of 1822, Statutes at Large of South Carolina, Vol. 7, at 462 (1840).

[I]f any shop keeper, trader, or other person, shall . . . buy or purchase from any slave, . . . any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, such shop keeper, trader, or other person, shall, for every such offence, forfeit a sum not exceeding one thousand dollars, and imprisonment not exceeding a term of twelve months, nor less than one month. Act of 1817, Statutes at Large of South Carolina, Vol. 7, at 454 (1840).

enforce isolation, to recover fugitives, to frustrate conspiracy and to suppress insurrection. Immediate needs for labor were enforced on the plantation if necessary through the force of the master, overseer and drivers.

State, county and municipal rights of slave ownership were codified in slave codes. Enforcement of the codes was entrusted principally to state militia and county patrols. Federal military authority enforced provisions of the federal Constitution[7] and federal law regulating slavery. County and city

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[7] United States Constitution, Article I
Section 2, Clause 3

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons . . .

Section 9, Clause 1

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

United States Constitution, Article IV
Section 2, Clause 1

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States . . .

Section 2, Clause 3

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

patrols of the state militia were central to the control of Black people. All white males, ages 16-60, were liable for patrol duty on a rotating basis.

In many places, the patrols and the militia were indistinguishable. Patrol duties included: "Patrolling the roads at night to prevent escapes, chasing and recovering fugitives, detecting and breaking up unauthorized gatherings of slaves, searching cabins for arms, and in general preventing any movement of slaves not authorized by a written pass." J. Scott, The Origins and Development of the KKK As A Badge of Slavery, at 2 (Jan. 1981) (available in Northeastern University School of Law Library); see also A.L. Higginbotham, In the Matter of Color (1978).

Patrols exercised, with government sanction, the power of summary judgement over the lives of the slaves. They were arresting officers, prosecutors, judges and hangmen, all rolled into one. Terror, intimidation and abuse of power was the norm, not the exception. In defense of the supremacy of the white slave-owning community, the power of the patrols extended over free Black people, as well as slaves, for offenses minor or imagined.[8]

The outbreak of the Civil War intensified the need for the patrol system. Southern secession eliminated the Constitutional guarantee of federal military support against Black uprisings. The Fugitive Slave Act became a dead letter. Well-founded fears of insurrection or flight increased during the war. Slaves began to desert their owners in droves. Many joined the ranks of the Northern army. The level and nature

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[8] For the operation and organization of patrols in general *see*, J. Scott, Hard Trials on My Way: Slavery and the Struggle Against It 1800-60, 122-4 (1974); J.G. Taylor, Negro Slavery in Louisiana, 130, 170-1, 203-4 (1963); M. Mooney, Slavery in Tennessee, 10-14 (1957); J.H. Franklin, The Militant South 1800-61 (1956); K. Stampp, The Peculiar Institution: Slavery in the Antebellum South, 214-5 (1956).

of violence directed at slaves and other Blacks escalated significantly.[9] The success of efforts to enhance the effectiveness of slave patrols was uneven.[10] In spite of the Emancipation Proclamation, slave patrols, although seriously disrupted, were still in existence when the South surrendered at Appomattox in 1865.

B. *Exclusion from Participation in Public Safety Agencies Has Survived Slavery and Continues to be Used to Deny the Promise of Freedom.*

Neither the Emancipation Proclamation, the Thirteenth Amendment, or the initial Civil Rights Acts of 1866 were able to destroy the mosaic of restrictions that excluded Blacks from the economic mainstream.[11] Those determined to keep Blacks

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[9] "In numerous instances mounted slave patrols ran runaways down with their horses, shot them on the road, or tied them to their horses and dragged them to the nearest jail." Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery, 54 (1979).

[10] *See*, John Hope Franklin, From Slavery to Freedom: A History of American Negroes, 280-1 (2d ed. 1956).

[11] Slavery, at its root, was an economic phenomenon. Hence, it is not surprising that a prime concern of the framers of the Thirteenth Amendment was the economic well-being of newly freed Blacks. Congress was concerned that Blacks be accorded civil and political rights in order that they could protect and advance themselves economically. The Black Codes — i.e. the legislation passed in Southern states designed to return Blacks to a state of semi-slavery — was never far from the mind of Congress in exacting the anti-slavery amendment. Representative Godlove Orth of Indiana acknowledged that something more than merely the right not to be held as property was involved in abolition and added that the right of "personal freedom without distinction" was involved. Ebon C. Ingersoll of Illinois stressed that the amendment would bring Blacks the right to enjoy the rewards of their labor. James Harlan of Iowa emphasized that the amendment would give Blacks the right to own property — and, strikingly, the right to protect and advance their property rights by the right to bring suit, testify in court and to speak and write freely. Cong. Globe, 38th Congress, 2d Sess., 143 (January 6,

second class citizens forever — no more than "hewers of wood and drawers of water" — worked indefatigably.[12] They

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1865); *See, e.g.* Cong. Globe, 38th Congress, 1st Sess. 1463 (April 7, 1864); Cong. Globe, 38th Congress, 2d Sess., 487 (January 28, 1865). Though there was not unanimity in Congress regarding the plan of some legislators (Sumner, Thaddeus Stevens, George Julian, Benjamin Wade, *et al.*) to allocate land to the freedmen, there was recognition that "special measures" had to be taken if Blacks were not to fall back into a second-class economic status. Congressional reports and documents of that era are replete with this concern. House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864: General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen, No. 3, 38th Congress, 1st Sess. Senate Executive Documents, Preliminary Report Touching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission, No. 53, 38th Congress, 1st Sess. (1864). Senate Executive Documents, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War, No. 53, 38th Congress, 1st Sess. (1864). The Freedmen's Bureau was both the clearest expression of congressional concern about the economic plight of the freedmen and the clearest expression of the reach of the Thirteenth Amendment. Though some have argued otherwise, it is certain that the Freedmen's Bureau was seen as a concrete realization of the anti-slavery amendment and was based upon it; *See* G. Bentley, A History of the Freedmen's Bureau, at 117, (1st ed. 1955). This was the view of conservative, moderate and so-called "radical" Congressmen alike. This is also the view of the two leading authorities on the Freedmen's Bureau and post-bellum land reform. *Compare*, W. Rose, Rehearsal for Reconstruction: The Port Royal Experiment, (1st ed. 1965); W. McFeely, Yankee Stepfather: General O. O. Howard and the Freedmen, at 199, 267 (1968); *See also*, W. McFeely, Unfinished Business: The Freedmen's Bureau and Federal Action in Race Relations, Key Issues in the Afro-American Experience, Vol. II, at 5 (Huggins, Kilson & Fox ed. 1971). Congress recognized and the Bureau proceeded to implement the incontrovertible fact that the peculiar status of Blacks as a result of slavery, necessarily meant that peculiar legislation had to be designed to fit their needs. In that sense, the Freedmen's Bureau can be seen reasonably as an early form of what is known today as "affirmative action." Further, the fact that the architects of the Thirteenth Amendment also authored the Freedmen's Bureau, is recognition of the sound *constitutional* basis for "affirmative action."

[12] It is undoubtedly certain that in approving the Thirteenth Amendment and its concomitant, the Freedmen's Bureau, Congress was attempting to af-

mounted an assault during the Reconstruction years immediately following the Civil War. One southern state after another enacted "Black Codes", locking Blacks into subordinate status as a substitute for slavery.[13]

Vagrancy and apprenticeship laws severely restricted the ability of Blacks merely to seek gainful employment to diversify their economic base.[14] Certain forms of economic activi-

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fect directly the inferior economic status of Blacks, that the Black Codes were designed to promote. Congress was aware of the South Carolina legislation that forbade Blacks on farms to sell farm products without written authorization; the Mississippi law forbidding Blacks to rent or lease lands outside towns or cities; the special taxes that hit Blacks and Blacks alone; the provisions in virtually every Southern state's code containing detailed provisions on labor contracts, apprenticeship and vagrancy, all tailored to perpetuate a second-class economic status for Blacks. Not incidentally, after the Black Codes were passed, the migration of Blacks from rural areas — where the Codes were developed to maintain them as a form of cheap labor — to the cities was halted. T. B. Wilson, The Black Codes of the South, at 66-80, 96-116 (1st ed. 1952).

[13] The enactment of the Black Codes regulated the conditions of freedmen's labor and subjected them to the control of their former masters or other white men. While these codes were abolished during the period of Reconstruction, they later reappeared. G. Myrdal, An American v. Dilemma, at 228 (Harper & Row ed. 1962).

[14] The Virginia Vagrant Act of 1866 provided that "in case any vagrant shall, during his term of service, run away from his employer without sufficient cause, he shall be apprehended on the warrant of a justice of the peace and returned to the custody of his employer, who shall then have him, free from any other hire. Among those declared to be vagrants are all persons who, not having the wherewith to support their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work in the place where they are."

In ordering the non-enforcement of the Virginia Vagrant Act, General Terry stated, "In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves . . . The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept

ty, as a matter of law, were closed to Blacks completely. Other fields of employment were open only upon terms different from those imposed upon whites.[15]

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and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated — a condition which will be slavery in all but its name." E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1st ed. 1880).

[15][I]t shall not be lawful for a person of color to be the owner, in whole or in part, of any distillery where spirituous liquors of any kind are made, or of any establishment where spirituous liquors of any kind are sold by retail; nor for a person of color to be engaged in distilling any spirituous liquors, or in retailing the same in a shop or elsewhere. A person of color who shall do anything contrary to prohibitions herein contained shall be guilty of a misdemeanor, and, upon conviction, may be punished by fine or corporeal punishment and hard labor, as to the district judge or magistrate before whom he may be tried shall seem meet.

No person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment, or business, (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person, until he shall have obtained a license therefor from the judge of the district court, which license the judge may grant upon petition of the applicant, and upon being satisfied of his skill and fitness, and of his good moral character, and upon payment by the applicant to the clerk of the district court of one hundred dollars if a shopkeeper or peddlar, to be paid annually, and ten dollars if a mechanic, artisan, or to engage in any other trade, also to be paid annually: Provided, however, that upon complaint being made and proved to the district judge of an abuse of such license, he shall revoke the same: And provided, also, that no person of color shall practice any mechanical art or trade unless he shows that he has served an apprenticeship in such trade or art, or is now practicing such trade or art. *Id.*

The right to contract, while recently made available to Blacks, continued to be burdened.[16] Nor could Blacks buy or sell property on the same terms and conditions as whites.[17]

These restrictions are merely illustrative. Pervasive racial discrimination and exclusion permeated every aspect and institution of American society.

Widespread private discrimination formed the bedrock for maintaining this new system of racial segregation. Gentlemen's agreements flourished and matured into restrictive covenants.[18] Legal sanctions encouraged, sustained, and sometimes even required general support and acceptance of private racial discrimination. Domination and control, in the final analysis, were the principal methods of enforcement.

Throughout the South, the slave patrol system was resuscitated, often in conjunction with a militia apparatus composed of Confederate army veterans. Renewed patrol activity initially was directed primarily at the control of Black labor.[19]

> For which the militia is to be reorganized appears clearly from the uses it was put to whenever a local organization was effected. *It is the restoration of the old patrol system*

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[16] All contracts between any persons whatever, *whereof one or more of them shall be a person of color* . . . shall be void as to all persons whatever unless the same be put in writing and signed by the vendors or debtors and witnessed by a *white* person who can read and write. (Emphasis added) *Id.*

[17] *See*, R. Higgs, Competition and Coercion; Blacks in the American Economy, 1865-1914, at 11-13, 91-92 (1st ed. 1977); Senate Executive Document, No. 6, 39th Cong., 2d Sess. (1866), Laws of South Carolina, 1865, at 275-276, 292-299; *In re Turner*, 14 Fed. Case 247 (1867).

[18] V. Wharton, The Negro In Mississippi, 1865-1890, at 79 (1965); Bentley, at 104-106; *Shelley* v. *Kramer*, 334 U.S. 1 (1947) (restrictive covenants were enforceable at law until this case was decided).

[19] Joint Committee on Reconstruction, 39th Congress, *Report*, Part III, 10 (Washington, D.C., 1966; reissued New York, 1970) [hereinafter cited as Joint Comm. Report.]

> which was one of the characteristic features of the regime of slavery. . . . The militia, organized for the distinct purpose of enforcing the authority of the whites over the blacks, is in itself practically sufficient to establish and enforce a system of compulsory labor without there being any explicit laws for it . . . . [T]he reorganization of the county patrol system will result in the establishment of a sort of *permanent martial law* over the negro. (Emphasis added.)[20]

This focus expanded to include Black political and cultural activity. Black leadership often was targeted for assasination[21] and independent political gatherings were often broken up with brute force.[22] Federal efforts to curb patrol abuses were

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[20] C. Schurz, Report on the Condition of The South (1969).

[21] "with increasing regularity . . . white terrorists focused their violence on blacks in leadership positions who symbolized to them the excesses of the present and the dangers of the future — teachers, clergymen, soldiers, and political activists. If black teachers and clergymen were not themselves mobbed or threatened, their schoolhouses and churches were often burned to the ground, and black pupils were apt to be assaulted or intimidated even when attending separate schools." L. Litwack, Been In The Storm So Long: The Aftermath of Slavery at 278 (1979).

[22] In the suppression of even the most innocuous independent political activity, Mobile, Alabama, has the dubious distinction of being perhaps the first U.S. city to spawn a fully-fledged police riot. General Thomas Kilby Smith, commanding the southern district of Alabama, described what happened on July 4, 1865 in Mobile when 6,000 Black inhabitants celebrated Independence Day. The Mobile police set upon them, beat them, raped them, and threw them in jail. He characterized the rioters as hirelings of the slave power, who "*having been Negro drivers and professional Negro whippers, were fitting tools for the work in hand.*" C. Schurz, Report on the Condition of the South, 9 App. (1969) (On this occasion, evidently, the police force became one gigantic town patrol. Their mob spirit, the General said, was only kept in check by the presence of federal troops.)

either nonexistent or woefully inadequate.[23] Some of the patrols merely were driven underground into one of the myriad of white supremacy organizations like the Klu Klux Klan (KKK).[24]

The 1877 political compromise signaled an end to the Reconstruction era. Federal troops withdrew from the South. Whites moved to reconsolidate their economic and political power. Many local governments institutionalized the patrols as police. Virtually all Blacks were disenfranchized quickly from the political process. Segregation and degradation were reimposed even more tightly then under the system of slavery. Lynching became virtually a regional recreational pasttime. Employment opportunities in the South were few and impenetrable. Government work of any kind was nonexistent.

A small but steady number of Blacks began migrating from the South to the North in search of work. Most found that they also were marked by their color in the North. They were woefully unskilled. They entered the labor market on the lowest rung in constant fierce competition with newly arrived British and European immigrants. Obstacles to obtaining a government job were formidable. White immigrant groups successfully closed ranks around local government jobs. This was equally true for Northern police and fire departments that were controlled by groups particularly successful at fending off Black access. Not only did the government take no affirmative action to address the situation, government civil service practices often actively encouraged job discrimination. For example, until 1942 the U.S. Civil Service Commission required

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[23] See J.T. Trowbridge, The South: A Tour of its Battlefields and Ruined Cities, at 463 (1969).

[24] J. H. Franklin, From Slavery to Freedom, at 323 (1956); K. Stampp, The Era of Reconstruction 1865-1877, at 199-200 (1965); V. Wharton, Negro In Mississippi, 1865-1890 (1965).

applicants to submit photographs with job application, thus permitting race identification. United States Commission on Civil Rights, *A National Not a Special Interest*, at 12-18, 22-30 (1981). Traditional avenues of employment mobility were closed to Blacks during this period.[25]

The post-World War II economic expansion permitted Blacks to emigrate to Northern industrial cities. 1950-1970, government service sector jobs expanded greatly. Blacks filled lower level government jobs spurned by whites with access to private industry. Demands for jobs, public housing, welfare, health care and other basic services mounted. The private sector was unable or unwilling to respond.[26]

Black political agitation was the response. Predictably, the government heard white America. Criminal justice expenditures were increased to contain ghetto street crime and drug offenses.[27] White police presence in the Black community was expanded appreciably. Public sector unions primarily controlled by various ethnic groups bolstered their membership and militancy, against providing service to the Black community. By mid-1960, the long smoldering situation ignited. For many Blacks, the problem and the remedy focused on the police.[28] City after city erupted in riot. The country truly was stunned. The elite Kerner Commission on Law Enforcement and Administration of Justice scrutinized the criminal

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[25] U.S. Commission on Civil Rights, A National Not a Special Interest, 12-18, 22-30 (1981).

[26] J. Mollenkopf, "The Crisis of the Public Sector in America's Cities," Essays on the Political Economy of Urban America with special reference to New York, R. Alcaly and D. Mermelstein (Eds. 1977).

[27] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 1102 (GPO 1967).

[28] H. Hill, "Race and Labor," The Journal of Intergroup Relations, vol. X, No. 1 (1982).

justice system.[29] The conclusion was direct. The appointment of minority police was a high priority objective of all departments in communities with a substantial minority population.[30]

> The problem is symbolic. In neighborhoods filled with people suffering from a sense of social injustice and exclusion, many residents will reach the conclusion that the neighborhood is being policed nor for the purpose of maintaining law and order but for the purpose of maintaining the status quo.[31]

Numerous studies and reports followed.[32] A federal government agency was created. But the conclusions remained the same.

Police departments did not respond warmly or voluntarily. Reported instances of police brutality increased. City after

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[29] National Advisory Commission on Civil Disorders, Report, 157-194 (Bantam ed. 1968).

[30] *Id.*

[31] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (GPO 1967).

[32] National Advisory Commission on Civil Disorders, Report (Bantam ed. 1968); National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime (GPO 1973); National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism (GPO 1976); National Commission on the Causes and Prevention of Violence, Violence in America (Bantam ed. 1969); National Commission on the Causes and Prevention of Violence, To Establish Justice and Insure Domestic Tranquility (Bantam ed. 1970); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (GPO 1967); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (GPO 1967).

city was assailed for its patterns and practices of police violence to Black residents. The inadequacy of fire and other municipal services also was challenged. Suit after suit was filed against police and fire departments alleging racial discrimination in hiring and promotions.[33] Numerous orders were entered directing strict compliance with affirmative action policies.

Despite some changes, the battle lines in the street have remained much the same. Police and Fire departments continue to function today much like the all white slave patrols. The minority population in Boston is over thirty per cent. The proposed layoffs in this case would have reduced minority representation to 6.2% in the police department and 9.1% in the fire department. These percentages would have provided only token, not meaningful, minority participation in violation of the Thirteenth Amendment. The District Court modification was consistent with the Constitutional requirement to remove all badges and incidents of slavery.

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[33] *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 579 (6th Cir. 1982); *Bronze Shields, Inc.* v. *N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981); *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981); *Guardians Ass'n of New York City* v. *Civil Serv.*, 633 F.2d 232 (2d Cir. 1980); *Alexander* v. *Aero Lodge No. 735, Intern. Ass'n, Etc.*, 565 F.2d 1364 (4th Cir. 1977); *Wygant* v. *Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D.Mich. So. div. 6th Cir. 1982); *NAACP* v. *Detroit Police Officers Ass'n, Etc.*, 525 F. Supp. 1215 (E.D.Mich. So. div. 1981); *Bd. of Ed. of City of New York* v. *Califano*, 507 F. Supp. 827 (S.D.N.Y. 1981); *Oliver* v. *Kalamazoo Bd. of Ed.*, 498 F. Supp. 732 (W.D.Mich. So. div. 1980); *Acha* v. *Beame*, 438 F. Supp. 70 (S.D.N.Y. 1977); *Croker* v. *Boeing Co. (Vertol Div.)*, 437 F. Supp. 1138 (E.D.Pa. 1977); *Equal Emp. Opp. Com'n* v. *American Tel. & Tel. Co.*, 419 F. Supp. 1022 (E.D.Pa. 1976); *Watkins* v. *United Steel Workers of America, Loc. No. 2369*, 369 F. Supp. 1221 (E.D.La. 1974); *Commonwealth of Pa.* v. *Local U. No. 542, Int. U. of Op. Eng.*, 347 F. Supp. 268 (E.D.Pa. 1972); *City & Cty. of Denver* v. *District Court, Etc.*, Colo., 582 P.2d 678 (1975); *Chance* v. *Board of Examiners*, 79 F.R.D. 122 (S.D.N.Y. 1978); *Schaffer* v. *Tannian*, 17 EPD ¶ 8642 (E.D.Mich. So. div. 1978); *Youngblood* v. *Daizell*, 13 EPD ¶ 11, 511 (1976); *Cates* v. *Trans World Airlines, Inc.*, 12 EPD ¶ 11, 137 (S.D.N.Y. 1976); *U.S.* v. *Inspiration Consolidated Copper Co.*, 6 EPD ¶ 8918 (D.Ariz. 1973); and *U.S.* v. *U.S. Steel Corp.*, 5 EPD ¶ 8619 (N.D.Ala. So. div. 1973).

C. *It was Proper for the District Court to Conclude that the Historical Exclusion from Public Safety Agencies Constitutes a Badge and Incident of Slavery.*

For one hundred years, the nation has failed to acknowledge or define the new national substantive rights enacted by the Thirteenth Amendment.[34] The U.S. Supreme Court, however, has concluded that the Thirteenth Amendment, does not merely abolish chattel slavery. Congress is authorized to outlaw all forms of slavery and involuntary servitude, including all badges and incidents. State laws upholding slavery are nullified by reflex or self-executing charter.[35] These propositions reflect current controlling law that this Court twice has reaffirmed during the last decade.[36]

The only real issue left for debate is how to determine what is a badge or incident of slavery appropriate for Thirteenth

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[34] A. Kinoy, *The Constitutional Rights of Negro Freedom*, 21 Rutgers L. Rev. 387 (1967) (hereinafter Kinoy I); A. Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on "Jones v. Alfred H. Mayer Company"*, 22 Rutgers L. Rev. 537 (1968) (hereinafter Kinoy II).

[35] *Civil Rights Cases*, 109 U.S. 3, 20, 34-36 (1883).

[36] *Civil Rights Cases*, 109 U.S. 3, 20, 34-36 (1883); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon* v. *McCrary*, 427 U.S. 160 (1976). In *Jones*, the Court upheld an effort by Black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section one of this Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." In resting judicial action upon this statutory basis the Court was forced to face the ultimate question of the source for Congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment "'to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Kinoy II, *supra* at 538-9.

Amendment remediation. This question was addressed directly in the historic debate between Justice Bradley and Justice Harlan. Justice Bradley favored limiting the remediable badges and incidents of slavery to those "that interfered with their [Freedmen's] fundamental rights" of citizenship. *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. *Id.*

Justice Bradley stressed the literal, legal trappings of slavery. He totally ignored the legislative history of the Thirteenth Amendment and denied the historical reality of the institution of slavery and its institutional aftermath.

Justice Harlan on the other hand, urged a more expansive reading of what were the badges and incidents of slavery. For Justice Harlan, the odious racial inferiority and white supremacy theories, articulated in *Dred Scott* v. *Sanford*, 60 U.S. 393 (1856) were overruled completely by the Thirteenth Amendment.

> I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adop-

> tion of (the Thirteenth) amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen [*sic*] of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character . . . . 109 U.S. at 36 (citations omitted).

The more expansive view of Justice Harlan has best withstood the test of time. The facts presented in this particular case, however, fall well within the more restrictive parameters set by Justice Bradley and subsequently subscribed to by this Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

The promise of the Thirteenth Amendment to recast the position of Blacks in the economic and political life of America remains unfulfilled. The pervasive and persistent exclusion of Blacks from meaningful participation in local and state public safety agencies is the direct result of a cohesive system of racial stigmatization. As the most visible and discretionary government law enforcement representative, the public safety officer daily defines the boundaries of society's social freedom. "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes." *Jones*, *supra* at 441-442. Society is defined significantly by those who serve in

these positions. A direct consequence of Black exclusion from meaningful participation in these agencies is a denial to Blacks of the fundamental right "to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981. This exclusion refuels a false sense of white superiority and Black inferiority. This, in turn, becomes a self-perpetuating justification for continuing the exclusion of Blacks not only in this area but throughout American society. "[R]acial discrimination [that] herds men into ghettos [*sic*] . . . is a relic of slavery." *Id.*

D. *The District Court Modification was Required by the Thirteenth Amendment and Supersedes any Tenth Amendment Objections.*

Petitioners proffer several different arguments in support of strict seniority layoffs pursuant to Mass. Gen. Laws ch. 31, § 39. All of these arguments are without force or effect in the face of the Thirteenth Amendment. *Marbury* v. *Madison*, 5 U.S. 137 (1803). The federal court remedial power to provide an effective remedy may set aside an otherwise valid state law. See, *e.g.*, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1968); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 459-460 (1972); *United States* v. *Mississippi*, 339 F.2d 679, 684-85 (5th Cir. 1964); *United States* v. *Duke*, 332 F.2d 759, 767-69 (5th Cir. 1963).

The mandate of the Thirteenth Amendment is clear. A new separate and independent fundamental right of freedom for American Blacks was created. Paramount constitutional power now exists to ensure that members of the race of freedmen can assume positions as equal members of the political and economic community.

Application of the Massachusetts seniority statute would have decimated minority representation within both the

Boston police and fire departments. This would have resulted in the clear reversal of a ten year effort by the court to ensure the realization of political and economic rights for Blacks. The modification by the district court was consistent with the mandate of the Thirteenth Amendment to remove all barriers to the realization of the fundamental rights guaranteed by the Thirteenth Amendment.

> The "Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free . . . ." But the same opinions also indicate that the "entire Court," both the Bradley majority and the Harlan dissent, were likewise in agreement that the Thirteenth Amendment "is undoubtedly self-executing without any ancillary legislation . . . ." and that "[b]y its own unaided force and effect it abolished slavery, and established universal freedom." The "self-executing" nature of this "charter of universal freedom" is further emphasized by Justice Bradley's powerful description of the dual thrust of the Amendment, which, as he put it, not only has the effect of "nullifying all State laws which establish or uphold slavery . . . ." but has a "reflex character also, establishing and decreeing universal civil and political freedom throughout the United States . . . ." That the courts have an independent role to play in enforcing this self-executing charter of "universal civil and political freedom," whenever a case involving these rights properly comes before them as a case or controversy within Article III cognizance, is made dramatically clear by Justice Bradley's coupling of the Thirteenth Amendment together with the Fourteenth as "undoubtedly self-executing without any ancillary legislation . . . ." Kinoy II, at 545. (Citations omitted.)

Conclusion.

> The problem is how to establish — for the first time in our history — the terms on which colored minorities might be expected to accept the legitimacy of the social order itself, and therefore to grant it their allegiance and loyalty.[37] (Citation omitted.)

In the "real world of which we are all a part . . . in order to treat some persons equally, we must treat them differently."[38] Therefore, "to *be* equal is, first of all, to *become* equal. It is a process, wherein power can be obliged to help undo what power in the past has wrongly created."[39]

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[37] L. Dunbar, "Toward Equality, Toward A More Perfect Union", in National Urban League, *The State of Black America 1982*, 47 (1982).

[38] *Regents of the University of California* v. *Bakke*, 438 U.S. 255, 407 (1978) (Justice Blackmun concurring).

[39] *Op. Cit.* at 50.

Respectfully submitted,

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APPENDIX

AMICI STATEMENTS OF INTEREST

The AFFIRMATIVE ACTION COORDINATING CENTER (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG). with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations, as well as other groups have joined as amici in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative actions programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights

attorneys to discuss the WEBER, BAKKE, FULLILOVE, and WHITE cases.

AACC publishes an informational newsletter entitled AACC News. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equaly employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the Courts. We are intimately concerned about how the operation of the last-hired,first-fired principle, if applied in this case, would disproportionately affect our constituency. Therefore, we urge this Court to find the modifications of the consent decree in this case to be a valid expression of the National mandate against race discrimination.

The NATIONAL LAWYERS GUILD (NLG) was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive, conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs in every affirmative action case since Bakke. The Guild standing committees Affirmative Action/Anti-Discrimination Task Force and the National Commission on the Oppression of Women have specifically considered and adopted the position advocated herein.

The NATIONAL LABOR LAW CENTER, founded in 1980 is a non profit legal and educational organization. It is a project of the National Lawyers Guild. It maintains a referral network of labor lawyers and a clearinghouse of information and research on current developments in labor law. It develops educational and training materials for lawyers and labor activists, provides some litigation and counseling services and pulishes a journal, Labor Update. Its purposes are to assist the efforts of workers to build unions where there are none and to strengthen and democratize their organizations. The National Labor Center urges support for the plaintiffs' position in that the decision of the lower courts provides an equitable relief which appropriately balances seniority and affirmative action where discrimination has been found or where the vestiges of past discrimination still exist.

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The AFRO-AMERICAN POLICE LEAGUE, a fraternal organization made up primarly of Black members of the Chicago Police Department, urges affirmance of the decision of the Court of Appeals upholding modification of consent decrees covering the City of Boston Police and Fire Departments for three primary reasons.

First, the modification was necessary to eliminate the present and continuing effects of discrimination, in accordance with the original decrees' purpose. Second, the modification was constitutionally mandated, pursuant to the Thirteenth Amendment, to prevent perpetuation of past discrimination. Third, the modification was a proper exercise of the Court's power, in a discrimination case, to ensure that relief ordered not be canceled out by seniority-based layoffs.

The AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION, REGION I is a professional association for equal opportunity/affirmative action administrators and specialists, individuals and organizations sharing similar interests and concerns. The membership includes representatives from the private,public, academic, and health sectors. It is the New England component of the national Association, founded in 1974. There are approximately one hundred members. We support the decision below in the Boston police and firefighters cases.

THE ASIAN LAW CAUCUS, INC., is a community-based law office serving the Bay Area Asian community. Established in 1972, we handle cases in the areas of employment/labor, immigration, and general civil rights. We have worked with the Asian-American Legal Defense and Education Fund very closely for the past five years, and are active in the National Lawyers' Guild.

We support the arguments put forth in the AACC brief asking the court to maintain strong affirmative action programs when findings of racial discrimination have been made. In the long run, it is in the interest of all workers to support anti-racist measures which attempt to remedy the injustices of past and current discrimination.

Although seniority is an importan tool to protect against arbitrary actions by employers, we recognize that seniority,

when combined with racist policies, perpetuates discrimination and locks generations of minorities out of key sectors of employment.

We note that there is historic violence and harassment pertetrated by police departments upon Asian and other minority communities nationwide. Although we believe that an integrated police force will not resolve this situation, we would support all efforts to gain affirmative action in public and private employment.

THE BLACK AMERICAN LAW STUDENTS ASSOCIATION (BALSA) was founded in 1968 to advance the interests of Black law students and to direct and encourage those students into areas of service to the Black community. As an organization whose members have benefited from affirmative action, we are extremely disturbed that the national mandate that racial discrimination be eliminated from the institutional life and practice of the country may be undermined by the constant attack against well founded policies supporting affirmative action. BALSA firmly believes that the Thirteenth Amendment to the Constitution provides the proper judicial basis from which to evaluate affirmative action programs that are endangered by economic cutbacks.

BLACK EDUCATORS' ALLIANCE OF MASSACHUSETTS, was created for the purpose of advocating and lobbying for the interests of minority administrators, teachers, parents and students in Massachusetts. The Alliance, previously the Negro Teachers' Association, was founded during the mid-sixties in response to the lack of representation of minority issues in the teachers' unions and school committees. Its major goal is to advocate quality education and affirmative action. The Alliance represents several hundred Black teachers and administrators, and is an associate member of the New England Black Educators' Association. The Alliance , which faced similar attacks in the education sector, supports the holding of the court below.

BLACK WOMEN FOR POLICY ACTION is a Boston organization which has as one of its mandates securing jobs for minorities. Since 1977 it has been active in Boston Politics to ensure access for women and minorities in the public and private sector. It completely supports the need for minorities on the Boston Police and Fire Departments.

CASA LATINA, a project of Hampshire Community Action Commission of Northhampton, Massachusetts, has been in existence fourteen years serving the lower income population in Hampshire Cunty. We have advocated at every level, to have hispanic individuals hire by industiral , commercial and governmental employers.

Our main advocacy effort has been to have hispanics employed in the delivery of human services, including police and court services in the city.

The absence of hispanic police has meant that there has been consistent harassment of our community especially in low income family housing projects. Incidents have occurred when police reacted without understanding what people were saying to them. Unnecessary arrests were made. Innocent people have been sentenced in courts which

have no spanish-speaking staff interpreters.

We strongly support the power of the court to order and maintain affirmative action in the police and law enforcement sectors.

Entering its twelfth year at the Catholic University of America Law School, the Center for National Policy Review has recently achieved important breakthroughs:

The Center's recommendations for streamlining Federal fair employment programs to make them better serve the needs of employers, unions and victims of discrimination were largely adopted by the Carter Administration:

The Center's lawsuit, brought on behalf of eleven national and regional fair housing groups, led the Federal financial regulatory agencies to take firm action against redlining and other discriminatory practices of banks and savings institutions;

The Center as Cousel to the School Boards of Wilmington, Delaware and Indianapolis, Indiana helped win two major cases which produced peaceful and effective school desegregation for the metropolitan areas of each city;

The Center's study of the $11 billion Comprehensive Employment and Training Act (CETA) program helped secure more effective rules targeting jobs and training for the hard-core unemployed and prohibiting discrimination;

The Center also provides training for law student interns in the Civil Rights field.

THE CENTER FOR THIRD WORLD ORGANIZING is an organization of organizers, activists and scholars who train members of Black, Lations, Asian-American and Native American communities in organizing skills and techniques. Many of the organizations and individuals that we serve are deeply concerned about affirmative action and the protection of the rights of minorities. CTWO strongly supports the concept that the Thirteenth Amendment is the legal basis of all affirmative action programs. While we understand that this concept provides initial legal protection for Americans of African ancestry, we believe its acceptance and implementation as national policy will eventually evolve to provide similar protections for victims of discrimination from other racial and ethnic groups.

CONNECTICUT ALLIED BUSINESS LEGAL RIGHTS ASSOCIATION (CABLRA) is an organization of minority business men and women in Connecticut. Its purpose is to fight past discriminatory practices and enforce affirmative action with respect to Executive Order 11246. The CABLRA has been an amicus in minority contractor cases and supports the plaintiffs' stand on the necessity for affirmative action considerations in employment decisions.

The CIVIL RIGHTS COALITION FOR AFFIRMATIVE ACTION was formed in Boston in 1980 in response to the anti-affirmative action movement that is threatening this country. The Coalition members are individuals who have long worked for the rights of all people, particularly minorities and females, who have long been discriminated against, to have equal access to employment opportunities, in private, public and educational institutions. The Coalition has and will continue to make their views known to legislators, both on the local and national levels. Its members support the affirmative action order below.

EDUCATORS UNITED is a multi-racial organization of teachers and aides who work in the Milwaukee Public School System. Our purpose is to work for equal and quality public education.

We strongly believe that our government must ensure equality for minorities in the workplace through preferential treatment in hiring and layoffs. This is the only way past vestiges of discrimination will be eradicated and minority representation in the public workforce raised to a level that reflects the composition of the constituencies that are being served.

ESPERANZA UNIDA is a non-profit social service and educational community organization which serves injured and unemployed workers in Milwaukee, Wisconsin. The majority of the people we serve are Spanish-speaking. Our Organization has over 500 members and gives services to between 500 and 750 people per month. One of the primary concerns of our work is to return the injured and unemployed people we serve to the job market. The use of affirmative action has done much to give hope to our community. Any errosion of this principal, which is intended to correct the effects of discrimination, would be devastating to us. We also believe that the principal of equal participation of all people in the job opportunities of our communities is essential to stability and the preservation of this principal must be considered as a greater good to our society

when it conflicts with other principals. Without the continued use and support of affirmative plans the idea of equality has no meaning to us.

THE GREATER BOSTON INTERDENOMINATIONAL MINISTERIAL ALLIANCE is an ecumenical alliance of seventy churches and over 100 ministers in Boston who put spiritual principles into action on issues of moral, ethical and economic development.

Our members rode the school buses in Boston and went into the schools to see that Black children were treated fairly and to help implement integration.

Our members are active in securing an equitable contract share for minority contractors. Our prison committee has opposed racial injustice in the Massachusetts criminal system, and most recently campaigned to oppose capital punishment.

The Alliance engages in social action based upon a belief that inequities still exist which prevent all

minorities from moving into mainstream America. These obstacles are a remnant of slavery. A white police force is, in particular, an image of oppression which ought not to be in a land where everyone was born to be free. The Greater Boston Interdenominational Ministerial Alliance believes that the principles of affirmative action contained in the court order are morally, ethically and spiritually correct and necessary in Boston.

This statement is an indication of a wholehearted endorsement of the Massachusetts Association of Afro American Police, Inc.'s efforts to gain full access to those privileges which are inherent within the Boston Police and Fire Department for each of its employees, regardless of race, creed, color or religion.

The LEAGUE OF MARTIN is a nonprofit organization incorporated in 1974 pursuant to Wisconsin sec. 181., Stats. Members of the League of Martin have been Milwaukee police officers and the organization's primary concern is racial discrimination within the Milwaukee Police Department. The League of Martin has undertaken numerous activities to eliminate discriminatory employment practices of the City of Milwaukee Police Department including, but not limited to, litigation and filing of charges of discrimination, by its members, with the United States Equal Employment Opportunity Commission.

With respect to litigation the League of Martin and individual black Milwaukee police officers are currently plaintiffs in a certified class action, League of Martin, et al., v. City of Milwaukee, et al., 81-C-1465, pending in

the United States District Court of the Eastern District of Wisconsin. The League of Martin has also protested unlawful race discrimination in complaints to the Office of Revenue Sharing of the United States Treasury Department.

The League of Martin has consistently acted upon its belief that race discrimination is not only harmful, and in violation of the law, to the victims of the discrimination but also the legitimate objectives of professional, competent, and fair law enforcement. The League of Martin has also encouraged and supported the use of affirmative action plans to correct the effects of past discrimination.

MASSACHUSETTS BLACK LEGISLATIVE CAUCUS is an association of Black state legislators who have applied their political skills and experiences in order to facilitate the development and power of people of color throughout Massachusetts. The Caucus was originated in November, 1972, and presently consists of Representatives Royal Bolling, Jr, Doris Bunte, Sandra Graham, Raymond Jordan, Byron Rushing and Senator Royal Bolling Sr. We believe that the decision below is consistent with our goals.

MASSACHUSETTS CITIZENS AGAINST THE DEATH PENALTY is a coalition of five thousand individuals and organizations who have opposed the restoration and implementation of the death penalty in Massachusetts for the last two years. The race discrimination which permeates the imposition of the death sentence has been judicially recognized by the Massachusetts Supreme Judicial Court in Watson v. District Attorney, 1980 Mass. Adv.Sh. 2231 (1980), and by this Court in Furman v. Georgia, 408 US 238 (1972). Our entire campaign against such racism documents our support for the affirmative action remedy necessary for the Boston Police and Fire Departments.

MID-TOWN NEIGHBORHOOD ASSOCIATION, has represented Black, Hispanic and other minorities in West Milwaukee for twenty years. It was incorporated in 1952 to preserve, conserve, and improve properties within the area of association. It believes discrimination is a crime as destructive as murder and as expensive as war. Therefore it supports the affirmative action order in the Boston police and fire departments.

THE MILWAUKEE MINORITY FIREFIGHTERS ASSOCIATION ("MMFFA") is an organization of City of Milwaukee firefighters organized to cultivate and maintain professional competence among firefighters and to promote unity and brotherhood. The City of Milwaukee Fire and Police Commission continues under a consent order for affirmative action hiring due to past alleged discrimination. The MMFFA joins as amicus curiae because it believes that adopting the position advocated by the Boston Police Association and Firefighters Union would have a profound negative effect on the recruitment, retention, and promotion of minority firefighters across this country. The MMFFA also believes that the only way to properly integrate the fire and police departments at this time is through affirmative action.

MINORITIY EDUCATORS IN MASSACHUSETTS PUBLIC COLLEGES AND UNIVERSITIES is an organization consisting of 350 minority educators throughout the state of Massachusetts. The purpose of the organization is to provide a network for keeping minority educators in public institutions abreast of developments that relate to their respective roles and responsibility. The objectives are: to develop cooperation and mutual support among minorities in public institutions, to develop a clearing house for minorities with problems; to develop a viable communications system among minorities in public institutions to address issues, such as enrollment and financial aid that affect minority students admission and retention in public colleges and universities , and to respond to issues that affect the employment of minority professionals.

THE NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION (NAARPR) is a broad-based coalition of labor, political, church, civic, student and community organizations and individuals committed to repelling and bringing about an end to the growing repression in the United States. The NAARPR appears here as amici because the case Castro v. Beecher is yet another example of the need to stop attacks on affirmative action programs which are necessary to abolish the patterns and practices of institutionalized racism and to correct patterns and practices of discrimination against Afro-American, Native American, Latino American, Asian American, Pacific Island and other minorities. We affirm that discrimination cannot be abolished by policies that ignore its existence.

For this reason the NAARPR joins this brief. Should the Court's order modifying the consent decree in Castro v. Beecher be

struck down, the racist dogma of so-called "reverse discrimination" will be given "legal" credibility and ultimately be detrimental to the interests of the working people of the United States, white as well as Black. Statistics prove time and again that every economic gain made by Black Americans has improved not only their lives, but the lives of all working people in this country, and especially the poor.

THE NATIONAL BLACK UNITED FRONT, headquartered at 415 Atlantic Avenue in Brooklyn, N.Y. is a mass-based, grassroots, progressive organization. Under the chairpersonsip of Reverend Herbert Daughtry, we have amassed 24 chapters across the country. MBUF is concerned about the plight of the Afro-American community throughout the United States.

We believe that the legacy of Africans in America, who have suffered from over 200 years of enslavement and an additional 100 years of an apartheid-like system of racial separation, demands that this country provide reciprocity for the injustices committed against the Afro-American family and wage earner. Affirming the modification of the consent decree in this case would signal this Court's commitment to ending the injustices our communities have been confronting for years.

THE NATIONAL BLACK UNITED FUND is a national philanthropic organization. NBUF is dedicated to serving the needs of the underserved and oppressed Black community by rechanneling funds from that community back into the causes and issues that are necessary for the survival and prosperity of Blacks in America. NBUF is deeply concerned that in our worsening economy, the last hired-first fired pattern of Black employment will wipe away those minimal but significant against that Blacks have made through affirmative action. We believe that there must be a remedy under law for historical or continuing patterns of racial discrimination that does not end merely because of national economic problems. Therefore, we join with amici in asking the Court to sustain the affirmative action plan currently in place in the Boston Fire Department.

THE NATIONAL CENTER FOR TRADE UNION ACTION AND DEMOCRACY/LABOR TODAY ("TUAD") is an organization which was formed to provide a structure within which the various elements of the growing rank and file labor movement could join together in support of their common interests. Throughout the life of TUAD, it has stressed the importance of providing women and minority people with the jobs and opportunities that they have been denied due to discrimination and its effects. This is based upon an understanding that the rank and file members of the labor movement will only achieve their legitimate goals in life if no section of that movement is deprived of the right to strive for those goals. In furtherance of this understanding, TUAD has consistently,

since its formation in 1970, encouraged and supported the use of affirmative action plans to correct the effects of past discrimination in the work places of this country.

OFFICINA LEGAL DEL PUEBLO UNIDO, of San Juan, Texas, has, since 1975, been bringing grand jury, employment discrimination, farm worker and police brutality cases in the Rio Grande Valley of Texas. Through such cases, including Castaneda v. Partida, 430 US 482, we have always fought for equal access and retention of all minorities in all forms of employment.

OPERATION PUSH, INC. is a multi-racial national community-based civil rights organization with 90,000 members, headquartered in Chicago, Illinois. We are advocates for the poor and have worked with labor for the drafting, passage and enforcement of affirmative action legislation. We grew out of Operation Breadbasket, the economic arm of the Southern Christian Leadership Conference, lead by Dr. Martin Luther King.

Amicus is concerned that the discriminatory practices against Blacks and Hispanics by city and state civil service systems has a significant impact on employment opportunties for Blacks and minorities in the United States workplace. Our major educational projects, and our many contracts with major U.S. corporations to provide jobs for the poor will be jeopardized if court ordered affirmative action cannot be protected in times of layoff.

THE PARISH COUNCIL OF HOLY ANGELS CATHOLIC CHURCH at 3970 N. 12th Street in Milwaukee is organized as the elected governing body of parish concerns. As a Church ministering to the need of people of inner city Milwaukee, especially minorities, a chief concern has been the injustice to which minorities have been subjected. Affirmative action policies are one remedy for past exclusion from employment opportunities. Therefore, the Parish Council is very interested in the case of Boston Firefighters Union Local 718 v. NAACP, Boston Police Patrolmen Association, Inc. v. Castro; and Beecher v. NAACP. The Council sincerely hopes that efforts to create justice in the workplace will not be reversed.

THE SISTERS OF ST. DOMINIC based in Racine, Wisconsin is a national congregation of Catholic women religious of approximately 400. In 1977 the Sisters of St. Dominic stated that they would identify with the poor, oppressed and alienated and would work in an advocacy role helping them to secure what is rightfully theirs. The community holds that integration of te public work force is a value to be achieved and supercedes strict seniority in hiring and layoff procedures.

THE URBAN LEAGUE OF EASTERN MASSACHUSETTS, an affiliate of the National Urban League, is an interracial non-profit community service organization which has the following as its goals: the elimination of racial discrimination and segregation; and the procurement of equal rights and opportunities for Black Americans and the poor in all sectors of our society. Therefore, it is the mission of the Urban League of Eastern Massachusetts to close the gaps that exist between the races in economic, social, and political spheres through the provision of direct services consistent with the needs and goals of the poor and disadvantaged. There are approximately three hundred members of the organization. The proportional layoff of police and fire officers eliminates segregation, ensures equal rights and closes part of the gap that exists between the races in Boston.

THE WISCONSIN BLACK LAWYERS ASSOCIATION (WBLA) is an organization of attorneys formed in 1973 for the purpose of, among other things, advocating needed legal and judicial reform to make justice available to all people; assisting the Black community in eliminating the root causes of poverty and powerfulness; defending Blacks from all who deny them basic human and legal rights; using legal tools and discipline for the advancement of educational, economic, housing, health delivery systems, social institutions for Blacks and a greater share of the better things available in this society.

The WBLA hereby declares its support of the court ordered integration under attack in the case of Boston Fire Fighters Union Local 718 v. NAACP, Boston Police Patrolmen Asssociation, Inc. v. Castro; and Beecher v. NAACP.

WOMEN FOR ECONOMIC JUSTICE, INC. was established by former members of the Massachusetts Governor's Commission on the Status of Women to publicize and ameliorate the economic problems which affect women in our economy. Toward that end we have instituted economic literacy programs around the state providing information to other women's groups. As part of that program we help women understand the relationship between economic status and racism and have held conferences on the issue of pay equity. A primary objective of our organization is the furtherance of affirmative action for women and third world people and the elimination of all forms of employment discrimination. We believe that the ability of the Court to maintain during a layoff the progress made in hiring minority firefighters and police is crucial to an ultimate end to

racial discrimination in the Commonwealth of Massachusetts.

THE WOMEN'S COALITION, INC. is an umbrella organization of thirteen women's organizations in Milwaukee, Wisconsin. The Coalition was established in 1972 to meet the needs of Milwaukee area women through organizing, establishing services, providing a meeting place for women, and creating a centralized information and referral service. Among its activities has been sponsoring annual "Take Back the Night" demonstrations and activitites related to the problem of sexual assault and violence against women, and thousands of persons have participated in these actions locally.

The Women's Coalition has always been committed to advocating equal rights and access by minorities and

women in American society. The coalition also perceives there to be a substantial problem in Milwaukee regard-ing police community relations, and believes affirmative action in hiring and retention of minorities and women to be an essential element of ameliorating such problems.

THE WOMEN'S JUSTICE CENTER of Detroit, Michigan which has been in existence for more than five years has the purpose of advocating the legal rights of women with an emphasis on employment discrimination. The Women's Justice Center has an interest in the outcome of this case because its accomplishments could easily be lost if there is not a continued sensitivity by the courts to the priority of preserving previously imposed remedies to past discrimination despite the challenge of difficult economic times.

MOTION F
DEC 17 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,
v.
PEDRO CASTRO, ET AL.,
Respondents.

NANCY B. BEECHER, ET AL.,
Petitioners,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

v.

PEDRO CASTRO, ET AL.,
Respondents.

No. 82-259

NANCY B. BEECHER, ET AL.,
Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Public Em-

ployee Department, AFL-CIO (PED), respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioners in these consolidated cases.

INTEREST OF THE AMICI CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The AFL-CIO is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women. The PED is composed of 30 of the AFL-CIO's affiliated unions having a total membership of 2,000,000 public employees.

The AFL-CIO and PED have consistently championed the rights of victims of discrimination to be made whole for the injuries caused thereby. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Franks* v. *Bowman Transportation Co.*, 424 U.S 747, advocating the result that this Court reached therein. There are, indeed, victims of discrimination in the fire-fighters case pending before this Court (those who took and failed the tests found to have violated Title VII) and those victims are, we believe, entitled to "rightful place" relief of the kind specified in *Franks*. But that is not the relief that has been awarded below. Instead, the lower courts have imposed a quota under which innocent employees who have statutory seniority rights to their jobs will be displaced by employees of another race who are *not* the victims of any discrimination.

The AFL-CIO has also consistently championed the rights of *private parties* to adopt, if they choose to do so, employment quotas in an effort to overcome the effects of past societal discrimination. The AFL-CIO's position in that respect is reflected by its joint brief with the United Steelworkers of America in *Steelworkers* v. *Weber*, 443 U.S. 193, advocating the result that this Court reached therein. But the instant case involves no privately adopted quotas, but rather quotas imposed by

courts as ostensible remedies for discrimination allegedly violative of Title VII and 42 U.S.C. §§ 1981 and 1983.

Movants wish to file this brief to make two points:

1. In light of this Court's holdings that unintentional discrimination does not violate either the Fourteenth Amendment or 42 U.S.C. § 1981, and the absence of any findings of intentional discrimination in these cases, the quota remedies at issue here cannot be predicated on §§ 1981 or 1983: where there are no violations there can be no remedies. That is a complete answer to the police case; in the fire-fighter case, where a violation of Title VII also was found, the question reduces to whether quota remedies are authorized by Title VII for proven acts of discrimination.

2. Title VII does *not* authorize courts to award quotas benefiting non-victims at the expense of innocent incumbent employees. The language of the statute, its legislative history, and historic principles of equity that Congress intended would apply in the formulation of remedies under Title VII all demonstrate that that is the judgment made by Congress.

The combined effect of our misgauging both how many printed pages the typed version of this brief as sent to the printer would make and how long it would take to bring our argument herein within the page limits set by this Court has resulted in this motion and the attached brief being only in final page proof on the due date, and in the filing of the requisite number of printed copies on the morning after the due date. To assure that our errors in these respects do not delay the processing of this case or prejudice the parties we have served that page proof on all counsel of record on the due date. Under these circumstances, we respectfully request that this motion be granted.

CONCLUSION

For the above-stated reasons, this motion for leave to file brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present an issue that this Court has not yet addressed: Whether in an employment discrimination case a court may, in order to achieve a particular racial balance, direct that innocent employees be deprived of their jobs so that the jobs may be filled by persons of another race who were not found by the court to be the victims of any unlawful employment practice of the defendants.

As we show in part I of this brief, the only violations of law found in the long history of these cases involved unintentional discrimination. It is now established that such conduct does not violate either the Civil Rights Act of 1866, 42 U.S.C. § 1981, or the Fourteenth Amendment as enforceable through the Civil Rights Act of 1871, 42 U.S.C. § 1983. Those statutes, which were the sole grounds for relief asserted in the police case, therefore could not be the predicate for the additional relief—the layoff quotas—ordered by the courts below. In the fire-fighter case, a claim was also made under Title VII of the Civil Rights Act of 1964, which does prohibit the type of unintentional discrimination found below. Thus, the issue presented here arises only in the context of the Title VII claim made in the fire-fighter case.

In part II, we show that in 1964 the authors of Title VII intended that the statute would not authorize courts to issue orders that require quotas or preferences, or indeed any form of affirmative relief granting benefits to persons who were not victims of the violation that is the

predicate of the particular order. We show further in part II, that Congress in enacting certain amendments to Title VII in 1972 did not intend to alter the remedial scheme of the statute so as to allow court-ordered quotas, preferences, or any other form of affirmative relief for non-victims.

In part III, we show that this Court's cases regarding the remedial scope authorized by § 706(g) have consistently drawn the line as Congress intended: between make-whole relief for actual victims of discrimination, which is permitted, indeed required, and relief for non-victims, which is not permitted. We further show in part III, that the basic principles of equity recognized in this Court's cases preclude a court direction that, on the basis of race, an innocent employee be deprived of his job so that he may be replaced by an employee who was not the victim of any discrimination found by the court.

ARGUMENT

I

At no time in the long history of the Boston police and fire litigation has there been a finding of intentional discrimination. On the contrary, the lower courts have been explicit that the only violations committed in each case were *not* intentional. *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972) (police); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (fire-fighters). That there was no intentional discrimination has an important bearing on the remedy questions before this Court.

In the police case, the violations predated the 1972 amendment extending the reach of Title VII to public employment, and the First Circuit stated that Title VII "would not seem to govern the purely past conduct at issue here", *Castro* v. *Beecher*, *supra*, 459 F.2d at 733 n.9. Rather, the "not intended" discrimination was found to violate only the Civil Rights Act of 1866, 42 U.S.C.

§ 1981, and the Fourteenth Amendment as enforceable through the Civil Rights Act of 1871, 42 U.S.C. § 1983—the First Circuit holding in 1972 that those sources forbade practices that have "racially discriminatory impact without intent." *Id.*, at 732-733.

The consent decree that was entered in the police case following the First Circuit's 1972 decision had as its sole and express purpose the remedying of the above-described unintentional discrimination. No subsequent violations have been found, and the additional relief ordered in 1981, the propriety of which is at issue in this Court, likewise was adopted for the express purpose of providing additional remedies for those same violations. (Petition Appendix in No. 82-185, at 12-15 (hereafter "Fire App.")).

In the intervening years, of course, it has become established by decisions of this Court that unintentional discrimination does not violate either the Fourteenth Amendment (and thus does not violate § 1983) or § 1981. *Washington* v. *Davis*, 426 U.S. 229; *General Building Contractors Assn.* v. *Pennsylvaia*, —— U.S. ——, 50 LW 4975, 4977-79 (June 29, 1982). A threshold question, therefore, is whether the *additional* relief ordered in the police case in 1981 can be upheld as a "remedy" for supposed violations of §§ 1981 and 1983, when intervening decisions of this Court have made clear that those provisions were not violated. The answer to that threshold question could be dispositive of the police case, in which the only violations alleged, and found, were of §§ 1981 and 1983.

The court below asserted that "the pattern of relief which the present modifications in the decrees seek to preserve was *conclusively established* prior to those decisions" (Fire App. A-13; emphasis added). Thus, apparently it was proper in the court's view to build additional remedies upon the initial findings of violation even though it has since turned out that those findings were wrong. But a federal court cannot impose new "rem-

edies", which take from innocent private parties rights conferred by a lawful state statute, when at the time those "remedies" are imposed intervening court decisions have established that there is no proper predicate—no violation of law—for any remedy. The impropriety of the course followed by the lower courts follows *a fortiori* from the rulings of this Court that a defendant is entitled to be relieved of prospective application of an *existing* injunction when "the circumstances, whether of law or fact, obtaining at the time of its issuance have changed," *System Federation* v. *Wright*, 364 U.S. 642, 647, and in consequence the injunction "has been turned through changing circumstances into an instrument of wrong", *id.*, citing *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115. See also, *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424, 437-438.[1] That the additional relief ordered here is, in the absence of a violation, an "instrument of wrong" is beyond question, for it deprives innocent persons of rights accorded by a lawful state statute, through the medium of the coercive power of a federal court acting without any federal justification for that deprivation.

For these reasons, the additional remedies ordered in the police case should be reversed without further inquiry; it is enough that federal courts are without power to order coercive remedies in the absence of any violation of law.

The posture of the fire-fighter case is somewhat different. In that case, the private plaintiffs who sought the additional relief at issue in this Court likewise rested their case solely upon §§ 1981 and 1983. But the United States had initiated a separate complaint, consolidated with that of the individual plaintiffs, alleging that the same practices also violated Title VII. The "not intentional" discrimination found was held by the First Cir-

---

[1] The principle stated in text is no less applicable when the injunction from which relief is sought "has been entered . . . by consent." *Swift, supra*, 286 U.S. at 114-115.

cuit in 1974 to violate all three statutes. *Boston Chapter N.A.A.C.P., supra*, 504 F.2d at 1021, and the consent decree that followed was for the express purpose of remedying those violations (Fire App. A7, A12-A14).

While as explained above the findings of violation of §§ 1981 and 1983 cannot support the imposition of additional remedies, that is not true with respect to the Title VII finding, for Title VII *does* forbid the type of unintentional discrimination found here, *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Accordingly, the propriety of the additional relief awarded in the fire-fighter case turns upon whether that relief is appropriate under Title VII—the issue to which we now turn.

II

The language and legislative history of Title VII show that the Title empowers the courts, on finding an unlawful employment practice, to provide complete equitable remedies to the individuals who suffered adverse employment consequences by reason of that unlawful practice but does not empower the courts to provide affirmative remedies to individuals who have not suffered such adverse employment consequences.[2]

1. The unlawful employment practice committed here is stated in § 703(a) which provides that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of em-

[2] Our showing is limited to "affirmative" relief because an employer who has engaged in discrimination in the past may be enjoined from continuing such discrimination in the future, and that injunction will inure to the potential benefit of all members of the group that the injunction insulates from discrimination. Such an injunction differs in kind from the affirmative relief Congress meant to be available only to actual victims.

> ployment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [Emphasis supplied.]

As this Court emphasized in *Connecticut* v. *Teal*, —— U.S. ——, 50 L.W. 4716, 4720 (June 21, 1982):

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

The logic of the statute then is to protect individuals who suffer discrimination by reason of their race, color, religion, sex, or national origin and not to protect "minority group[s] as a whole." It follows from that logic that it is the individuals who have suffered such discrimination by the respondent and not individuals who are members of a minority group but who have not suffered such discrimination who are entitled to secure Title VII's protections.

2. The sole Title VII provision defining the remedies that a court may order upon finding a violation of the statute is § 706(g). As enacted in 1964, § 706(g) provided:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, em-

> ployment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

The last sentence states that even where a court "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful Title VII employment practice," the resulting remedial order may *not* run in favor of an individual who suffered adverse employment consequences for "any reason other" than such discrimination. Certainly then the literal language of § 706(g) bars a remedial order that runs in favor of individuals who are members of a minority group but who have never suffered employment discrimination at the hands of the respondent. A quota remedy—*viz.* a remedy providing employment benefits to members of a minority group who have not been shown to have suffered adverse employment consequences by reason of the respondent's unlawful employment practice—therefore appears on the surface to be the very paradigm of the remedial order Congress determined should *not* issue in enacting the 1964 Civil Rights Act.

Moreover, as a comparison of § 706(g) and § 10(c) of the National Labor Relations Act (NLRA), as amended, suggests, and as Senator Humphrey—one of Title VII's primary sponsors—confirmed (p. 9 *infra*), § 706(g) was modeled on § 10(c). The decisions under § 10(c) of the NLRA are thus an informative guide to the intent of the Congress that enacted § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769, 774-775 and n.34; *Albemarle Paper Co.* v. *Moody*, 422 U.S.

405, 419; *Teamsters* v. *United States*, 431 U.S. 324, 366-367; *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 50 L.W. 4937, 4939 n.8 (April 20, 1982). It was well settled by 1964 that when an employer is found to have discriminated against union members in violation of § 8(a)(3) of the NLRA, the remedy provided under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority. In the NLRA's history an employer had never been directed to give preferential treatment to union members who were not victims of the violation. See *Franks*, *supra*, at 774-775, n.34; and see, *e.g.*, *Nevada Consolidated Copper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942); *Consolidated Dairy Products*, 194 NLRB 701 (1971); *Great Lakes Bridge & Dry Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corp.*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

3. Title VII's sponsors repeatedly confirmed that the Title does not empower the courts to issue quota remedies.

a. Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced (H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72.) These opponents declared this "a not too subtle system of racism-in-reverse". (*Id.* at 73.)

When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against

> one or more of his employees because of race, religion or national origin. . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.*[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566; emphasis added].

b. When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the Titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to*

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[3] *Ibid* (emphasis added). See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted, without change, as § 706(g)].

• • •

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548 (emphasis added)]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges*

> *which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[4] The April 11, 1964, issue of the Newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added].

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not pro-*

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[4] *Id.* at 5042. It is apparent from the numerous references to the Newsletter that the publication was widely read by Senators. See *id.* 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

> *vide that any quota systems may be established to maintain racial balance in employment.* [*Ibid.*]

Significantly, we have not found a single instance in which any proponent of Title VII ever suggested that the Title provided for or permitted court ordered quotas.

c. We have recounted above those statements by proponents that unquestionably addressed the question whether courts were empowered to award quotas for proven violations of Title VII. But these were not by any means the only "anti-quota" statements made by the bill's proponents. In addition to the charge that the EEOC and/or courts would impose quota remedies, opponents charged that racial imbalance would be found to be a *per se* violation of Title VII, and that employers would opt for quotas to avoid the *inference* of discrimination that might be drawn from racial imbalance.[5] In answering these various charges, the proponents repeatedly expressed Title VII's rejection of the concept of quotas. Some of these remarks were clearly responding to "quota" charges other than that courts would order quotas; others are ambiguous and may well have been specifically addressed to the charge that courts could order quotas. But all confirm that the proponents were opposed *in principle* to the government's imposition of quotas, and thus help explain *why* § 706(g) was drafted so as not to empower the courts to issue quota remedies. We set forth a number of these statements in the Appendix to this brief.

B. Everything said and done in 1964 leads to the conclusion that Congress in enacting Title VII intended to provide affirmative remedies for the victims of defendants' discrimination but not for non-victims. That intent as we have shown is crystalized in positive statutory law in both the basic substantive provision of the Title—§ 703—and in the basic remedial provision—§ 706(g). Nothing Congress has said or done since provides a basis for reading

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[5] See, e.g., *id.* at 5092 (Sen. Hill); 7418-20 (Sen. Robertson); 7800, 8500-01 (Sen. Smathers); 8618 (Sen. Sparkman).

Title VII as amended differently in this regard from Title VII as originally passed.

1. The only legislative act in the interim is the passage of the Equal Employment Opportunity Act of 1972 which amends Title VII in several respects. In essence, the 1972 law amends §§ 701, 702 and 704 to broaden Title VII's scope of coverage, and amends §§ 705 and 706 to grant the EEOC the authority to investigate charges and to bring suits in federal court. Section 703 of Title VII was not amended at all and the only arguably pertinent changes made in § 706(g) were the following additions to its first sentence (the new language is indicated in italics):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

The italicized language had its origin in an amendment introduced by Senator Dominick, who was leading one faction of a filibuster against the Senate Labor Committee bill. The most significant aspect of the Committee bill—and the principal issue causing the filibuster—was a proposal to confer "cease and desist" authority on the EEOC; that bill proposed to make no change in either § 703(a) or § 706(g). Adoption of the Dominick Amendment, which denied the EEOC independent enforcement power and instead empowered the EEOC to institute law suits in federal court, was the key to ending the filibuster. Neither Senator Dominick nor anyone else explained or even discussed the purpose of the additional language in the first sentence of § 706(g), and the only

explanation therefor is that contained in a Section-by-Section Analysis prepared by Senator Williams, the chairman of the Labor Committee and the manager of the legislation (118 Cong. Rec. 7166, 7168):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [Emphasis added].

As this Court explained in *Franks, supra*, 424 U.S. at 764 n.21, the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis

quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination . . .*" *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without some evidence of an intention to do so.

2. It has been suggested that even granting that the 1964 and 1972 Congress' *legislative actions* did not provide support for the proposition that Title VII provides remedies for non-victims, the judicial power to order such remedies may properly be inferred from certain congressional *refusals to act.* Relying on such inferences is hazardous at best; indeed, in light of the twin restraints imposed by the exclusive grant in the Constitution to the Congress of all legislative power and by the requirement that Congress to make a law must take *all* the steps specified in the Constitution, there is a substantial argument that congressional inaction is never a proper basis for Executive Branch or Judicial Branch action. But there is no need here to engage in that debate. For in this instance the congressional determinations in 1972 not to amend the 1964 Act do not in fact support the inference that the paradoxical purpose of certain refusals to alter Title VII was to signal a new consensus that both victims of the defendant's discrimination and non-victims alike were entitled to affirmative relief under Title VII.

a. The court below in its 1974 decision upholding a quota in the fire-fighter case dismissed the question of the "intent of the framers of Title VII [as] largely ancient history." 504 F.2d 1017, 1028. That court believed that the 1972 Congress' intent respecting court-ordered qoutas was the opposite of the 1964 Congress' intent:

> [P]articularly the failure of Congress to pass the Dent Amendment, which would have foreclosed all affirmative action plans and racial balance relief, lend[s] support to an inference that Congress ratified the power of the courts to impose color-conscious relief of the sort that had been approved in several cases at the time the attempts to amend the amendments failed. [*Ibid.*]

Review of the history of the Dent Amendment leads to just the opposite conclusion.

That history begins with the House Labor Committee reporting out H.R. 1746, a bill introduced by Representative Augustus Hawkins for himself and sixteen others. The bill proposed, *inter alia*, to give the EEOC "cease and desist" powers, to extend Title VII to public employment, and to transfer the authority to administer Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC. Although the report (H. Rep. No. 92-238, 92nd Cong., 1st Sess. 1971) accompanying the House Labor Committee bill contained no indication that the EEOC would have power to order quotas, the bill was perceived by some as having that effect (for the bill proposed transferring to the EEOC the powers of the OFCC to enforce Executive Order 11246, and the OFCC had required quotas in *its* administration of the Executive Order).

On the eve of the commencement of the House debate, Representative John Dent, the chairman of the subcommittee that reported the bill out and the Committee bill's floor manager, made the following declaration:

> Mr. Speaker, although the bill was reported by the Committee on Education and Labor some time ago by a rather substantial vote, I would be less than realistic if I did not recognize the deep concern many Members have with certain of its provisions. . . . In spite of our explanations, the fact remains that some provisions appear onerous to a majority of my colleagues.

> In an effort to make the bill conform to the will of a majority, I propose to offer three significant amendments on Thursday. [72 Leg. Hist. 189].[6]

One of Representative Dent's proposed amendments was to add a sentence to the bill providing:

> The Commission shall be prohibited from imposing or requiring a quot[a] or preferential treatment with respect to numbers of employees, or percentage of employees of any race, color, religion, sex, or national origin. [*Ibid.*].

The purpose of this amendment was explained as follows:

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [*Id.* at 190; emphasis added].

Debate began the following day, pursuant to a Rule (*id.* at 150-151) under which, after three hours of general debate, Representative Erlenborn could offer "as an amendment in the nature of a substitute" his bill (H.R. 9247), which differed radically from the Committee bill. The Erlenborn substitute proposed (a) not to give the EEOC cease and desist powers, (b) not to extend Title VII to public employment, and (c) not to transfer administration of Executive Order 11246 to the EEOC. Additionally, the substitute proposed to abolish Title VII class actions, and to make Title VII the exclusive statute

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[6] We use "72 Leg. Hist. ——" to refer to "Legislative History of the Equal Employment Opportunity Act of 1972," prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972).

regulating employment discrimination (thereby repealing, *inter alia*, the Equal Pay Act and § 1981 insofar as it applied to employment). In lieu of the "cease and desist" power proposed for the EEOC in the Committee bill, the Erlenborn substitute proposed to empower the EEOC to file Title VII actions in federal court. (*Id.* at 326-332).

Representative Carl Perkins, Chairman of the House Labor Committee, made the opening statement on behalf of the Committee bill. After describing its basic features, he announced that in light of "intensive . . . criticisms" the Committee planned to put forward at the appropriate time certain amendments, among them the prohibition of Executive Order quotas that Representative Dent had forecast the day before. (*Id.* at 199.)

Representative Quie made the opening statement in opposition to the Committee bill. As one of the arguments against transferring to the EEOC authority to administer Executive Order 11246, he noted that confusion would result "from the fact that OFCC has imposed requirements on Federal Government contractors which it is questionable may be imposed under the statute [i.e. Title VII]". (*Id.* at 202)

Representative Hawkins then spoke in support of the Committee bill. He stated, *inter alia*:

> [*S*]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [*Id.* at 204; emphasis added].

In response to a question from Representative Erlenborn as to whether Representative Hawkins supported the proposed Dent amendments, Representative Hawkins responded: "The amendments were discussed with me, I am very well aware of them, and I support all three." (*Id.* at 208.) Representative Hawkins added that Title

VII already "prohibits the establishment of quotas." (*Id.* at 209.)

Representative Steiger, a proponent of the Erlenborn substitute, declared the Committee bill's proposed transfer of power to enforce the Executive Order from OFCC to EEOC "a mistake." While stating that "I will not take the time to detail the reasons which relate to the genesis of the two agencies, their differing guidelines and different purposes" (*id.* at 223), Representative Steiger *did* "take the time" to attempt to sow dissension in the ranks of the Committee bill supporters. He "admit[ted]" to "being absolutely appalled" by the amendment Representative Dent "intends to offer", which would accompany the transfer of power from OFCC to EEOC with a "subverting [of] the Philadelphia Plan and the Office of Federal Contract Compliance's effort to carry forward an affirmative action program" (*id.* at 222).

> I intend to vote against it. I hope the House rejects it. The simple way to reject that amendment . . . is to adopt the Erlenborn substitute and to settle the question once and for all. [*Ibid.*]

A number of Committee bill supporters found this suggestion unpersuasive, noting that despite the civil rights mantle donned by Representative Steiger his suggestion would mean abolition of Title VII class actions, repeal of the Equal Pay Act and of § 1981's application to employment, denial of cease and desist power to the EEOC, and a refusal to extend Title VII to public employment. See, e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parrin Mitchell); *id.* at 236-239 (Rep. Drinan); *id.* at 264, 285-286 (Rep. Hawkins); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

Representative Erlenborn offered a reasoned explanation of why he thought it preferable to keep administration of the Executive Order in a separate agency from that which administers Title VII:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon con-

stitutional rights. It is not based upon statutory rights.

> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. *In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act.* I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [*Id.* at 231; emphasis added].

From that point forward, there were only sporadic references to the proposed Dent amendment. [*Id.* at 234-235, 252, 259, 260, 261]. But Representative Erlenborn correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261].

Throughout, as was also true in the Senate, the debate focused primarily on other questions: Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment? Should administration of the Executive Order be in the Department of Labor or the EEOC? (See, generally, *id.* at 191-311).[7]

Under the parliamentary procedure agreed to, the House voted first on the Erlenborn substitute. The Committee bill supporters had made a tactical decision not to offer amendments that would make the substitute more palatable. (*Id.* at 254) Despite that decision, the Erlenborn substitute passed by a vote of 200-194. (*Id.* at 312-314) The alignment was that traditionally associated with controversial civil rights legislation. Those who ordinarily took the "conservative" stance on such legisla-

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[7] Indeed, so clear had it become that the battle lines were drawn on a number of major themes that Representative Steiger eventually retracted his earlier suggestion that votes be determined by views about the Dent amendment. (*Id.* at 279)

tion voted for the Erlenborn substitute; those who traditionally took the "liberal" stance (including all members of the Black Caucus) voted against. Approval of the substitute ended further consideration of the Committee bill; the Dent amendment was never formally offered, and never voted upon—the amendment had become moot, as jurisdiction over the Executive Order remained in the OFCC.

Thus the First Circuit's hypothesis that the "failure of Congress to pass the Dent Amendment" indicated a Congressional approval of court-ordered quotas under Title VII (504 F.2d at 1028) fails: Not a single representative suggested at any point in the debate that quotas could—or should—be available to remedy Title VII violations. On the contrary, it was common ground that quotas were *not* available under Title VII and that Title VII should not provide for quotas.

The House debate just reviewed also refutes the First Circuit's view that the 1972 Congress approved the scattering of lower court decisions at the time standing for the proposition that Title VII authorizes quota remedies —decisions too few in number and too sharply contested by other lower courts and the commentators in any event to be considered the uniform and settled "law" as to Title VII's meaning.[8]

The federal courts have no authority to make new law by altering a statute or to set Congress' agenda by presuming that once a statute has been so altered the gloss created by a handful of lower court decisions, no matter how erroneous it is when judged against the underlying legislative materials, is frozen into the statute if those decisions are called to Congress' attention and the legislature does not respond by passing a new law restating in more emphatic terms the original legislative

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[8] See, e.g., the district court decision in the police case herein, *Castro* v. *Beecher*, 334 F.Supp. 930, 945 (D. Mass. 1971), which had not yet been reviewed on appeal at the time Congress acted in 1972; *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

intent. A later Congress may, to be sure, exercise the legislative power by stating that without regard to whether a particular judicial construction of a statute passed by an earlier Congress is erroneous, the later Congress in reenacting the statute desires to incorporate that construction into the statute. Moreover, this Court has said that

> Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." [*North Haven* v. *Bell*, —— U.S. ——, 50 L.W. 4501, 4507 (May 17, 1982), quoting *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10.]

But that, of course, is only a rebuttable presumption. There is no evidence in the House debates in 1972 that the House was aware of the lower court decisions ordering quotas. And, it is dispositive that the debate just reviewed shows that in 1972 the House was of the view that Title VII as passed in 1964 was intended to bar quotas and that the Title as amended by the House would and should continue to bar quotas. As we have seen, all factions agreed on both propositions. There is not a word in the House debate questioning that reading of the 1964 Act or suggesting that Title VII as amended would, could or should be read differently.

b. In contrast to the House, there was one amendment proposed in the Senate that did bear, at least in part, upon the power of courts to order quotas under Title VII. Senator Ervin proposed to add a new section at the end of the bill providing:

> No department, agency, or officer of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges [72 Leg.Hist. 1017].

The proposal was one of numerous amendments that Senator Ervin was introducing as a means to prolong the filibuster in which he was a leading participant. This particular amendment, he explained, was addressed primarily to the OFCC's adoption of the Philadelphia Plan, and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.)

Senators Javits and Williams spoke against the amendment. Senator Javits discerned two evils in the proposal:

> [I]t is clear that what is sought to be reached is, first the Philadelphia plan and similar plans in other cities, and beyond that, the whole concept of "affirmative action" as it has been developed under Executive Order 11246 and as a remedial concept under Title VII. [*Id.* at 1046; emphasis added].

With respect to the latter, Senator Javits cited two recent court decisions that he feared the amendment would "undo": a Ninth Circuit opinion that, as he described it, approved a remedy imposing "an affirmative duty for minority recruitment" (*id.* at 1048), and a district court decision in which "an affirmative order was actually entered requiring a union local to take in a given number of minority-group applicants" (*ibid.*). Senator Javits also cited two consent decrees recently entered: one in which "part of the decree required that 166 Negroes and Puerto Ricans be given preference—in filling future vacancies for which they were qualified," and another in which "the company agreed to make a good faith effort to hire from three minority groups for 20 percent of the clerical positions to be filled in the next 3 years" (*id.* at 1071).

Senator Williams opposed the amendment on broader grounds:

> I do not believe that it is the intent of the Senator from North Carolina to deny to the judicial and executive branches of Government all power to remedy the evils of job discrimination; but I am afraid—

> I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.
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> • • •
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> . . . This amendment raises the real threat of destroying any potential for effective law enforcement. If this amendment is accepted, I earnestly suggest that we will have a law, but there will be little chance for order under the law again if this amendment should prevail. [*Id.* at 1072-73].

The amendment was defeated by a vote of 44-22 [*Id.* at 1074-75].

For several reasons, the rejection of the Ervin amendment cannot be taken as a congressional decision to alter the 1964 Congress' decisions that the remedial scheme of Title VII is for the benefit of victims of discrimination and that quota remedies are not authorized.

First, given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against *all* the amendments proposed by Senator Ervin) were deciding their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by the proponents of the filibuster. The importance of such tactical considerations in the legislative process make it *always* dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to enact legislation.

Second, even if all who voted had listened attentively to the debate, and were voting strictly on the "merits" of the amendment as elucidated in that debate, the vote to defeat the amendment would shed no light on the views of a majority of the Senate as to the desirability of court-ordered quotas. While it is of course *possible*

that each Senator voting against the amendment was doing so to second Senator Javits' approval of court-ordered quotas, it is at least equally possible that those Senators were swayed by an interest in not disrupting administration of the Executive Order and/or a concern that Senator Williams' warning that the language of the amendment was so broad that "[i]t can be read to deprive . . . the courts of *any* power to remedy clearly proven cases of discrimination" was accurate. Surely, if the Senate had made a decision as fateful as overturning the considered decision of the 1964 Congress not to authorize quota remedies there would be stronger evidence than this from which to discover that decision. And in this respect it is especially noteworthy that the Section-by-Section Analysis which constitutes the definitive statement of the 1972 Congress' view of the remedial scheme focuses exclusively upon make whole relief for actual victims of discrimination (*supra*, p. 14).

Finally, even if a Senate decision favoring Title VII quotas could be gleaned from this equivocal evidence, it would remain true that the House was unalterably opposed to such quotas (*supra*, pp. 16-21). We know of no principle that would permit the overturning of a congressional decision made by both Houses and signed by the President simply because one house eight years later inferentially expresses a different view of what the law ought to mean.

III.

A. This Court's decisions regarding the remedial scope allowed by § 706(g) have consistently drawn the line where Congress intended that it be drawn: between make-whole relief for "actual victims of racial discrimination" (*Franks*, 424 U.S. at 772), which is permitted, indeed virtually required, and relief for non-victims of such discrimination, which is not permitted. In *Franks*, the Court stated (424 U.S. at 763-764, footnotes omitted):

> Last Term's *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), consistently with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. To effectuate this "make whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal courts . . . The legislative history supporting the 1972 amendments of § 706(g) of Title VII [quoted at p. 14 supra] . . . . is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

The Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an ORT driver" (424 U.S. at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32.[9]

The Court in *Teamsters* further developed the line drawn in *Franks*.[10] In *Teamsters*, the Court analyzed at

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[9] Under *Franks*, when a class violation of hiring discrimination is proved, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof is not equivalent to providing preferential treatment to non-victims. The issue remains, who were victims of the unlawful practice? Members of the class against whom the practice was committed—*e.g.* black applicants for jobs from an employer who was proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise. 424 U.S. at 773 n.32; see also *Teamsters* v. *United States*, 431 U.S. 424, 357-362.

[10] *Teamsters* involved a "pattern or practice" action brought by the Attorney General pursuant to § 707(a) of Title VII. Title VII contains no separate remedial provision for such suits. The *Teamsters* Court recognized that "[w]hen [in a pattern or practice suit] the Government seeks individual relief for the victims of the discriminatory practice," the Court's remedial powers are the same as if the suit had been brought by private plaintiffs. 431 U.S. at 361,

length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation. 431 U.S. at 356-377. That lengthy discussion in *Teamsters* would, of course, have been meaningless if courts were empowered under Title VII to provide remedies to non-victims.

B. There is another equally important lesson to be drawn from this Court's decisions regarding the remedial discretion afforded to courts in fashioning remedies under Title VII—a lesson that indeed transcends Title VII and applies to all forms of employment discrimination actions: it is not equitable for a court to direct that, on the basis of race, an innocent employee be deprived of his job so that he may be replaced by an employee who was not the victim of any discrimination found by the court.

In *Teamsters*, the Court stated (432 U.S. at 374-375):

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330. Cf. *Phelps Dodge Corp.* v. *NLRB* 313 U.S., at 195-196, modifying 113 F.2d 202 (CA2); 19 N.L.R.B. 547, 600; *Franks*, 424 U.S., at 798-799 (Powell, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably in-

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363-377. Thus, *Teamsters* applied the *Franks* analysis of § 706(g), limiting relief to those individuals who are actual victims, as the starting point for analysis. 431 U.S. at 363.

volved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what it workable." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.).

Only recently, albeit in a different context, this Court, in *Ford Motor Co.*, 50 LW at 4942, spoke to this same subject:

> Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters* v. *United States*, 431 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap back-pay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ——, —— (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong

> done him. We do not believe that "'the large objectives'" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden.

Where, as in the instant case, a court is asked to direct that a non-victim of discrimination be given the job of an innocent employee, solely because that non-victim is the same race as other persons who were actually discriminated against by the employer, there is not the competition of legitimate interests that calls into play equitable discretion. To give the non-victim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker . . . unfairly relegated to the unemployment lines" as a result of such a court order would have a "wrong done him." *Ford Motor Co.*, 50 L.W. at 4942.

C. The court below did not purport to justify its decision in remedial terms. That court did not state, and in truth could not, that the order upheld would restore victims of discrimination to their rightful place. Rather, that court acknowledged the contrary (Fire App. A22): "The relief sought originally was not for individuals, but to correct a condition of racial imbalance." The court below thought that achieving racial balance was a means to avoid "poor police and fire protection for those who need it most." (Fire App. A25). But improving police and fire services is not a remedial objective of Title VII. Indeed, that rationale does not depend on there having been any violation of Title VII or any other anti-discrimination law.

It bears emphasis that this is not a case in which a public employer has chosen to engage in racial selection in order to serve perceived "operational needs," and in which the question presented is whether that choice violates Title VII. In such a case, there is grave doubt whether the employer's conduct could survive a § 703

challenge, as we explain in the margin.[11] But whatever might be the outcome of *that* case, the federal courts, in exercising their responsibility under § 706(g) to provide remedies for proven discrimination, may not award affirmative relief to non-victims to effectuate the courts' notions of how public services are best delivered.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[11] In the 1964 Act, Congress excluded race from the "bona fide occupational qualification" exception, § 703(e)(1), and the legislative history makes clear that the omission was deliberate. As explained by Chairman Celler:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out. [110 Cong. Rec. 2550].

An amendment to include race in § 703(e)(1) was defeated by voice vote (*ibid.*). When Congress extended the Act to public employers in 1972, it did not amend § 703(e)(1). The only accommodation Congress made to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act, see § 701(f), an exclusion that does not embrace the employees in this case.

APPENDIX

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

And Senator Clark introduced written answers he had prepared to certain "objections" to Title VII that had been voiced, which included the following:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.[4]

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[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

[4] *Id.* at 7218.

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> • • •
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> • • •
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.[5]

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> • • •
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[6]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does

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[5] *Id.* a 7418-20.

[6] *Id.* at 8500-01.

not provide in any way for quotas of any kind."[7] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .
>
> An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.[8]

---

[7] *Id.* at 8618.

[8] *Id.* at 9113. In addition several Congressmen and Senators, recognizing that quotas would inevitably collide with the seniority rights of incumbent employees, cited protection of seniority systems as a reason for their opposition to quotas. See, e.g., the "Additional Remarks" of the Republican sponsors in the House, *supra* at 150; 110 Cong. Rec. 5423 (Sen. Humphrey); *id.* at 6563 (Sen. Kuchel); *id.* at 9113 (Sen. Keating); *id.* at 10520 (Sen. Carlson); *id.* at 11471 (Sen. Javits); *id.* at 15893 (Rep. McCulloch).

MOTION FILED
MAR 21 1983

Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

October Term, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

v.

PEDRO CASTRO, *et al.*,
Respondents.

NANCY B. BEECHER, *et al.*,
Petitioners,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a court modify a senority statute on lay-offs in order to preserve progress under a court ordered affirmative action program, when unforeseen circumstances develop and literal application of the statute would undo that progress.

2. Should the courts below have ordered the parties first to explore all alternatives to lay-off including those which would have added financial burdens to the municipality before resolving the conflict between the seniority statute and the affirmative action order.

Nos. 82-185, 82-246, 82-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

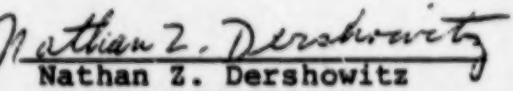
MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT OF TIME

The undersigned, counsel for the American Jewish Congress, respectfully moves this Court for leave to file out of time the accompanying brief amicus curiae in support of the respondents. The parties to the case originally consented to the filing of a brief but, for the reasons set forth in the attached affidavit of Howard M. Squadron, the American Jewish Congress

was unable to prepare and file its brief within the time permitted by the rules of this Court.

The American Jewish Congress believes that its brief makes a unique contribution to the discussion of the important issues involved in this case.

Respectfully submitted,



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Respondents.

AFFIDAVIT

HOWARD M. SQUADRON, being duly sworn, deposes and says:

1. I am the President of the American Jewish Congress.

2. I make this affidavit in support of the application for leave to file this brief amicus curiae out of time.

3. The issues involved in this case are ones of extraordinary significance to the American Jewish Congress. The issues

have been debated extensively by the Executive Committee of the American Jewish Congress, the highest policy-making body of the organization that meets on a regular basis.

4. An effort was made to prepare a brief for submission within the time allowed under the rules of the Supreme Court. Originally, the consent of the parties to file a brief amicus curiae was obtained.

5. However, it became necessary for officers actively involved in the issues to come from many different parts of the country to a meeting in order to decide on the parameters of the brief to be submitted to this Court. That determination was finally made at an extraordinary meeting held on March 7, 1983.

6. Upon the belief that the brief submitted herewith makes a unique contribution to the consideration of this case, we seek permission to file this brief out of time.

Howard M. Squadron

Howard M. Squadron

Sworn to before me
this 17 day of March, 1983

Bob Rappaport

BOB S. RAPPAPORT
Notary Public State of New York
No. 31-4741341
Qualified in New York County
Commission Expires March 30, 1983

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Gates v. Collier, 407 F. Supp. 117 (N.D. Miss. 1976), aff'd, 548 F.2d 1241 (5th Cir. 1977) . . . 31

Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), aff'd, 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974). 30

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). 31, 33

Int'l Bd. of Teamsters v. United States, 431 U.S. 324 (1977). 10

Louisiana v. Jumel, 107 U.S. 711 (1883). 32

McAleer v. A.T.T, 416 F. Supp 435 (D. D.C. 1976). 27

Milliken v. Bradley, 443 U.S. 267 (1977). 29

NAACP v.D.P.O.A., 525 F. Supp. 1215 (E.D. Mich. 1981). 18

New York State Ass'n for Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980). 33

North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 29

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Quern v. Jordan, 440 U.S. 332 (1979). 28

Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1975). 33

Savannah Printing Specialties v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972). . . . 13, 14

Tangren v. Wackenhut, 480 F. Supp. 539 (D. Nev. 1979), aff'd 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S.Ct. 1771 (1982) 14

United States v. County of Clark, 95 U.S. 769 (1874) 32

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United Steel Workers v. Weber, 443 U.S. 193 (1979) 13, 14

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Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) 33

Wright v. City of Emporia, 407 U.S. 451 (1972). 11

Constitution and Statutes

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¶ 443.59 F.E.P.. 22

Other Authorities

Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962) 14

Blumrosen & Blumrosen, The Duty to Plan For Fair Employment Revisited: Work Sharing in Hard Times, 28 Rutgers L. Rev. 1082 (1975) 19

Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy, 59 Geo. L. J. 393 (1970). . 32

Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980) 20

Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976). 20

N. Y. Times, 5/18/75 §4 at 8 col. 2 22

Silbergold, Title VII & The Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976). 20

Stacy, Title VII Seniority Remedies In A Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975). 20

Summers and Love, Work Sharing As An Alternative to Layoffs By Seniority: Title VII Remedies in Recession, 124 U. Penn. L. Rev. 893 (1976) 19

Thorp, Racial Discrimination and Seniority, 23 Labor L. Jnl. 398 (1972). 20

United States Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights 36 . . . . . 7, 8, 9, 23, 24

Waerdt, Affirmative Action and Tenure, 11 Jnl. L. and Educ. 507 (1982). 20

Wines, Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining, 20 Amer. Bus. L. J. 371 (1982) 23

Wood, Equal Employment Opportunity and Seniority: Rights In Conflict, 26 Labor L. Jnl. 3345 (1975) 20

INTEREST OF THE AMICUS

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

Consent to file this brief had been obtained but the brief was not filed in a timely fashion. Leave to file is therefore being sought by motion.

STATEMENT OF THE CASE

The amicus adopts the statement of the case contained in the brief amici filed by Robert Lipshutz, et al.

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should suffer most from lay-offs resulting from the passage in Massachussets of a tax limitation and expenditure measure, commonly called Proposition 2-1/2. On the one hand, laying off minority workers hired in increased numbers under a court ordered affirmative action program is inconsistent with our nation's commitment of the highest order, to eradicate all vestiges of discrimination. On the other hand, laying off employees out of sequence required by the bona fide seniority provisions embodied in the Massachusetts civil service statute and protected against challenge by Title VII is inconsistent with senior employees federally and state protected rights the preservation of which also reflects a strong public commitment.

Upon the assumption that the court was required to resolve the stark conflict between these competing values the court modified the state seniority requirements and incorporated an affirmative action component onto the statute.

Given the Court's assumption, as we argue below, its decision can be justified as a matter of law.

But we believe the resolution of the conflict in such stark terms was an inappropriate way to approach the issue. Rather, alternatives to avoid the conflict between seniority rights and preservation of the Court's decree should have been explored. The record is devoid of any such exploration.

We submit that the courts below should have imposed upon the parties the obligation of devising and exploring such alternatives, and, if no satisfactory proposal was advanced by the parties the

court should have determined on its own whether less painful and more equitable alternatives were available.

Thus, for example, work sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational lay-offs and attrition plans were never explored or evaluated by the parties or the Court.

We submit further that fiscal restraints imposed by Proposition 2-1/2 were not inviolate. The courts below had the legal power to, and should have, interpreted or if necessary superseded state law which infringed upon constitutional and other rights of the employees embodied in the affirmative action order and state and federally protected seniority rights.

ARGUMENT

Introduction*

The American Jewish Congress believes that the orders appealed from are within the equitable discretion of the Court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, nor the Constitution. The order below was within the district court's discretion, for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." Franks v. Bowman, 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

However, the District Court should have required the defendants to have explored, or should itself have explored, means of avoiding the head-on clash between

* The Introduction and Part A of Point I essentially replicate the Introduction and Point A of the brief amici of Robert Lipschutz, et al.

seniority protections and the minority rights given by Title VII. Such means were in fact available, since the laid-off workers have now actually been reinstated. This Court should now settle the law by requiring lower courts in matters of this kind to explore and, if necessary, to direct alternative approaches. Such approaches can include, in our view, retrenchment, reallocating available resources, worksharing and the like, or even superseding local laws limiting expenditures where necessary to preserve constitutionally protected anti-discrimination rights and seniority rights protected by federal and state law.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable principles permit overriding literal application of the seniority statute.

The district court in this case confronted one of the most troubling

dilemmas facing our society today: how to distribute the pains of recession and fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of nonminority groups.

Recession hurts many people, but minorities suffer the most. Because our nation has only recently undertaken to redress the centuries of segregation and discrimination, minorities have the shortest length of service and when fiscal restraints force cutbacks, they are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, Last Hired, First Fired:

Layoffs and Civil Rights 36 (1977).*

* The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devasting effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into place as a permanent, expendable economic and social underclass.
>
> * * *
>
> In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

If unemployment remains high, and the "last hired first fired" approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects, will be undone. See id. at 60-61.

There may be no painless options, however, and in the end someone may have to pay a price. Even if conventional seniority governs and older white workers keep their jobs,* the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group will suffer more from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Last Hired, First Fired 60-61, 25-26.

* Some senior workers will lose their jobs in any event because of the veterans and perhaps other preferences under Mass. Ann. L. ch. 30, § 9A (1979). See Sol. Gen. Br. 8 n.7 and 11, infra.

Certain basic principles govern, however:

(1) The eradication of discrimination and "the discriminatory effects of the past," Albermarle Paper v. Moody, 422 U.S. at 418, is the "primary objective" of Title VII, Franks v. Bowman, 424 U.S. at 768, n.28, and represents a national commitment of the "highest priority." Id. at 673.

(2) District courts are empowered under § 706(g) with "wide discretion . . . to fashion the most complete relief possible," Franks v. Bowman, 424 U.S. at 785; Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 361, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." Franks v. Bowman, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote

its purposes. United States v. United Shoe Corp., 391 U.S. 244 (1968); United States v. Swift, 286 U.S. 106, 119 (1932); cf. Wright v. City of Emporia, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, Franks v. Bowman, 424 U.S. at 778-79; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and it is frequently overridden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified

by statutes furthering a strong public policy interest." Franks v. Bowman, 424 U.S. at 778. In this very case, for example, seniority is not the dominant determinant with respect to lay-offs -- the veterans preferences created by Mass. Ann. L. ch. 30, § 9A, take precedence, and this has significantly affected who was laid off.* And the veterans preference is quite common. Franks v. Bowman, 424 U.S. at 778; Ford Motor Co. v. Huffman, supra, (agreement on veterans preference). Overcoming the effects of racial

* It appears that because of two large hiring waves in 1977-78 and 1979-80, a potential layoff of 252 police officers would normally mean at most a variance of only about two years or so between the most junior minority retained and the most senior nonminority laid off, if seniority were the only factor. The reason that the layoffs reached 19 white officers hired in 1970 is because of the Massachusetts statutory veterans preference. See Joint App. 90a; Sol. Gen. Br. 8 n.7. In the firefighters situation, there may be only a one-year difference between the most senior nonminority fired and the most junior minority retained.

discrimination has also justified an override of seniority expectations, Franks v. Bowman, 424 U.S. at 779, either through "constructive seniority" as in Franks, or by agreement. United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979); Savannah Printing Specialties v. Union Camp Corp., 350 F. Supp. 632 (S. D. Ga. 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. Aeronautical Lodge v. Campbell, 337 U.S. 521, 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is

compiled, and more,* that modifying a particular system to prevent reversal of some modest gains for a federal policy of the "highest priority," seems well within a court's equity discretion. Indeed, a statute or a voluntary union-employer agreement could so modify it. United Steelworkers v. Weber, supra, Tangren v. Wackenhut, 480 F. Supp. 539 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S. Ct. 1771 (1982); Savannah Printing Specialties v. Union Camp Corp., supra. In the cases at bar, both the district and appellate courts -- which have lived closely with these cases for over a decade -- noted that if they and the parties had forseen that the decree might

* See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); Amer. Tobacco Co. v. Patterson, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); Calif. Brewers Ass'n v. Bryant, 444 U.S. 598, 606-08 (1980).

be undercut by recession-induced layoffs, the order would have initially provided for the kind of seniority modification ordered by the district court in 1981. Jt. App. 28, 25.

Of course, seniority should not be lightly overridden. As the cases cited by petitioners indicate,* seniority has a very high value. For that very reason, the courts below had an obligation, as a matter of law, which was not fulfilled -- i.e., to explore and direct the implementation of other alternatives. Indeed, we believe the courts below had the power and obligation to supersede Proposition 2-1/2, if necessary.

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* The cases are distinguishable, however. For example, in Ford Motor Co. v. EEOC, 102 S.Ct. 305 (1982), the danger was that seniority would be adversely affected before discrimination was proven; here, it is already proven.

B. The Courts Below Should Have Considered Alternatives.

Before Boston was required to lay off police officers on a racial basis, the District Court should have required a showing that there were no alternatives, such as those suggested below, to the use of dual seniority lists.

Perhaps none of these alternatives standing alone would have been sufficient to prevent all layoffs. Taken together, they might have substantially reduced the need for layoffs, perhaps to the point where the racial impact was not so devastating that it need have been "cured" at all. Perhaps none of these would have worked. But if that is so, then the race-based layoffs would at least have been -- and been perceived as -- the least restrictive alternative, a prerequisite under University of California Regents v.

Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), for the use of racial criteria.

Moreover, this requirement that alternatives be considered is not only a requirement of federal constitutional law. Rather, it stems from the requirements of Title VII itself. The decision to reduce costs by means of layoffs, as opposed to the use of other cost-cutting alternatives,* is itself a decision about "the terms and condition of employment" subject to the Griggs rule that an employment decision which has a disparate

* In NAACP v. D.P.O.A., 525 F. Supp. 1215 (E.D. Mich. 1981), black police officers sued the police union for not considering givebacks as an alternative to last hired, first fired layoffs, which would impact most heavily on newly hired blacks. The theory was a breach of the duty of fair representation owed minority employees. The union defended citing the seniority provisions of Title VII. The Court refused the union's motion to dismiss, and set the matter for trial.

impact on minorities is illegal,* unless justified by business necessity. See Blumrosen & Blumrosen, The Duty to Plan For Fair Employment Revisited: Work Sharing In Hard Times, 28 Rutgers L. Rev. 1082 (1975); (hereafter Duty to Plan); Summers and Love, Work Sharing As An Alternative to Layoffs By Seniority: Title VII Remedies in Recession, 124 U. Penn. L. Rev. 893 (1976);

* The New York City Commission on Human Rights in 1975 issued an "interpretive memo" stating that employers were under a legal duty to explore alternatives to "last hired, first fired" layoffs which had a disparate impact on minorities.

(hereafter Recession Remedies).*

Numerous alternatives have been suggested by the commentators as an alternative to last hired, first fired layoffs as a means of reducing labor costs. Of course, as we argue elsewhere in this brief, Point C, infra, it is not clear that Boston should be permitted to use the lack of funds as a basis for shifting the burden of remedying its illegal actions. But even if it is, use of these alternatives in this

* Additional authorities who support exploration of alternatives in place of last hired, first fired layoffs include: Stacy, Title VII Seniority Remedies In A Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975); Silbergold, Title VII & the Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976); Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976); Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980); Wood, Equal Employment Opportunity and Seniority: Rights In Conflict, 26 Labor L. Jnl. 3345 (1975); Thorp, Racial Discrimination and Seniority, 23 Labor L. Jnl. 398 (1972); Waerdt, Affirmative Action and Tenure, 11 Jnl. L. and Educ. 507 (1982).

case would have eliminated the adverse impact on newly hired minority officers, and would have also eliminated the need for race based layoffs to the disadvantage of white employees. While these alternatives would not have been cost free, they would have avoided or minimized the need for consideration of race, a uniquely onerous burden under the Constitution.

Two distinct types of alternatives suggest themselves. First, the District Court should have explored the possibility that a reallocation of funds from other municipal activities -- or other aspects of the Police Department budget -- would have eliminated or ameliorated the need for layoffs of police officers.* Perhaps, too, the "crisis" would have resolved itself simply through normal attrition.

Second, even if it was determined that layoffs of police officers were necessary, the Court should have considered

alternatives which spread the effect of the layoffs more broadly, and which, consistent with the basic thrust of § 703(h), did not subordinate the rights of older white workers to minority workers. The alternatives of this type which at least should have been examined by the District Court and the parties include:

(a) Worksharing -- that is, the imposition of reduced hours for all employees, so that all might retain most of their income. This practice is widespread in several industries, notably the needletrades and furniture, as a means of allocating scarce work and fairly distributing hardships. Other instances of it have been reported. See, e.g., ¶443.59 F.E.P.; (Diamond International Corp.); N. Y. Times 5/18/75 §4 at 8 col. 2 (N. Y. Telephone).

There have, indeed, been numerous arbitration decisions addressing the

question of whether worksharing is inconsistent with collective bargaining agreements calling for last hired, first fired layoffs. The results are mixed, Recession Remedies, supra, 124 U. Penn. L. Rev. at 903 n.32., but the trend is towards finding no inconsistency.

While it has been found that worksharing is feasible only when the work week remains at 30-32 hours, Wines, Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining, 20 Amer Bus. L. J. 371 (1982), that is not an obstacle in this case, where less than a fifth of Boston's police officers were laid off.* Use of worksharing in the police context is also not unprecedented. The U. S. Civil Service Commission report, Last Hired, First Fired:

* Wines also cites studies showing that 20 percent of collective bargaining agreements in effect in 1973 called for work sharing. This percentage reached 67 percent in the furniture industry.

Layoffs and Civil Rights (1977), notes that the Detroit police department resorted to payless days to avoid the need for layoffs of minority workers.

(b) Rotating Layoffs -- Some have suggested that all employees be laid off for short periods of time, instead of indefinite layoffs of a few. There are several advantages of this scheme over long term layoffs -- most notably that each employee retains health insurance and pension benefits. Moreover, because the layoff is total (as is not the case with worksharing) employees are eligible for unemployment insurance, thus reducing the financial pinch imposed.

(c) Givebacks -- The parties could have considered cutbacks in salaries and frin e benefits (particularly vacations and personal days) with the savings used to retain other employees. Such

renegotiations of the union contract are today hardly uncommon.

(d) Early retirement -- The city might have been ordered to explore the possibility of making early retirement more attractive to older workers. One of the particular drawbacks of the scheme ordered by the Distict Court is that the workers most likely to have benefitted from the prior discrimination are not those laid off, while those who competed against blacks fairly are laid off. Making early retirement attractive (as by allowing fictional service credits) would allow for the preservation of jobs for those people who did compete fairly, and would place the costs of discrimination where they ought to be -- on Boston and its taxpayers.

Another advantage of early retirement is that it ameliorates one of the worst features of seniority based layoffs -- the discharging of young

aggressive workers instead of older, more settled ones. This alternative would make permanent the minority percentage gains on the police force, and would end the need for "quotas" at an earlier date.

(e) A variation on early retirement would be the compulsory retirement of persons already eligible for retirement pensions. This is particularly attractive for civil servants (particularly police and fire), where pensions typically allow for 20 years and out.

(f) Restrictions on overtime -- If Boston has some of its police and fire officers working scheduled overtime at premium pay, its elimination might save sufficient funds to avoid at least some layoffs. Of course, the nature of police (and fire) work is such that not all overtime could be eliminated.

(g) Voluntary layoffs (leave) -- Some employees might want to take

additional unpaid time off, whether for a few days or for several months.

(h) There is one other possibility which has not received any attention -- that of ordering Boston to pay damages to white officers laid off to maintain a complement of black officers. McAleer v. A.T.T., 416 F. Supp. 435 (D. D.C. 1976), relying on Chief Justice Burger's concurring opinion in Franks, held that such relief was appropriate. McAleer is attractive because it places the onus of correcting past discrimination on the guilty parties -- in this case, Boston and its taxpayers.

C. Proposition 2-1/2 Should Not Have Been Accorded Preferential Treatment and Permitted to Override the Decree and Seniority.

The dilemma which this case presents arises from a conflict among three different policies: the federal anti-discrimination policy, the state civil

service policy concerning seniority, and the state fiscal policy as expressed in Proposition 2-1/2. The courts below resolved this case by looking only at the clash between the first two policies; the third was viewed, implicitly, as beyond examination, perhaps because those courts believed they were powerless to order relief which would involve spending over the limits set by Proposition 2-1/2. In that, they erred.

It is a maxim that constitutional rights may not be denied for lack of funds. See, e.g., Bounds v. Smith, 430 U.S. 817, 824-25 (1977). A federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979);

Edelman v. Jordan, 415 U.S. 651 (1974).* See also Milliken v. Bradley, 443 U.S. 267 (1977) (affirming order of district court compelling state to pay for purchase of school buses as part of court ordered desegregation plan).

State law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than frustration. Perez v. Campbell, 402 U.S. 637 (1971). State policy must give way when it operates to hinder vindication of federal constitutional guarantees. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971).

Federal courts have not hesitated to suspend the effectiveness of state statutes which have interfered with the

* The Eleventh Amendment stands as no bar. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

implementation of court decrees. Thus, in Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), aff'd, 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974), the Housing Authority, under court order to increase the supply of housing as part of a desegregation plan, submitted proposed sites to the Chicago City Council as required by statute. When the Council refused to approve or even consider housing sites which the Authority had submitted, the court, finding that this had the effect of thwarting "correction of federal constitutional wrongs," suspended the statutory requirement of Council approval and replaced it with another approval mechanism. Similarly, in the course of Mississippi prison litigation, after the court prohibited acceptance of more prisoners in an overcrowded penitentiary, the state passed a statute requiring acceptance of all prisoners, and

the court thereupon issued a TRO against its enforcement. Gates v. Collier, 407 F. Supp. 117 (N.D. Miss. 1976), aff'd, 548 F.2d 1241 (5th Cir. 1977).

Proposition 2-1/2, purporting to limit the power to tax, may also be overridden if necessary to accomplish the aims of the decree. The federal courts have power to issue financing orders to secure individuals' constitutional rights to equal protection. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court said:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

Cf. Virginia v. West Virginia, 246 U.S. 565 (1918) (discussing mandamus of state legislature to levy a tax to satisfy a

judgment recovered by sister state). See generally Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy, 59 Geo. L. J. 393 (1970). But see United States v. County of Clark, 95 U.S. 769 (1874) (where county is taxing at maximum rate, mandamus cannot issue); Louisiana v. Jumel, 107 U.S. 711 (1883) (mandamus will not be issued for the release of money in the state treasury, without authorization and appropriation); Clay County v. McAleer, 115 U.S. 616, 618 (1885) (court cannot order taxing board to levy a tax in excess of maximum allowed where such tax is not enough to pay the judgment); United States v. County of Macon, 99 U.S. 582 (1879) (mandamus will not lie to compel the levy of a tax beyond the authorized amount).

While it is true that recent cases demonstrate that the courts are hesitant to order states or their political

subdivisions to raise and allocate sums of money and will explore all alternatives to such orders, including the shutting down of the offending institutions, see, e.g., Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1975); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980), it must be true, for the Supremacy Clause demands no less, that if such alternatives do not exist or would not be effective to remedy the Constitutional violation, the court is empowered to compel the states to raise and spend such funds as are necessary to remedy the violation. See Griffin v. County School Board of Prince Edward County, supra.*

* In June 1982 Massachusetts enacted legislation providing new revenues for Boston and requiring the recall of all laid off police and firefighters. This demonstrates that when more flexible alternatives are considered, methods can be devised for avoiding the painful conflict created by the clash between the principles underlying affirmative action and seniority.

Conclusion

For the above stated reasons, the judgment below should be affirmed but the order of the District Court should be modified to require consideration of alternate solutions in the event a conflict between the anti-discrimination remedy and other protected rights should arise in the future.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

vs.

PEDRO CASTRO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE

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QUESTION ADDRESSED

The judgment at issue herein set aside a seniority system mandated by state law and substituted a racially segregated seniority system in order to preserve two minorities' current "share" of jobs in the Boston police and fire departments. The question addressed in this brief is whether the court erred as a matter of law in modifying a consent decree that required quota hiring to include retroactive, class-based seniority where (a) there was no finding that racial discrimination was continuing or that layoffs under the state seniority system would be unlawful, (b) the modification was not tailored to aid the actual victims of past discrimination, and (c) there was an explicit finding that any past discrimination had been unintentional.

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STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE

CONSENT OF THE PARTIES

Petitioner and Respondents have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally inter-

ested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *De Funis* v. *Odegaard*, 416 U. S. 312 (1974); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport. Co.*, 427 U. S. 273 (1976); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979); *United Steelworkers of America* v. *Weber*, 443 U. S. 193 (1979); and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980).

The Anti-Defamation League shares the concern of the courts below that a police force be integrated to reflect the heterogeneous nature of our society. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. The Anti-Defamation League cannot accept, however, the concept adopted in the decision below that each ethnic group is entitled to proportional representation in public jobs. Such a concept is wholly contrary to two basic principles that flow from the Constitution's guarantee of individual rights: first, that all persons be free of discrimination directed against them on grounds of race, religion, creed, sex or national origin, and second that each person be judged on the basis of his or her

individual merits—not on the basis of the ethnic or racial group to which he or she belongs. It is these fundamental principles that form the basis for our argument for reversal of the decision below or, alternatively, remand for further findings.

STATEMENT OF THE CASE

In 1970 a class of unsuccessful black and hispanic candidates for appointment as Boston police officers brought suit under 42 U. S. C. § 1983 and the Fourteenth Amendment, alleging a policy and practice of discrimination against minorities in the hiring of police officers.[1] Although 16.3% of the population of Boston was black or hispanic in 1970, only 2.3% of the officers on the police force were members of those minority groups.

The complaint did not allege, and plaintiffs did not attempt to prove, purposeful discrimination. Rather, the district court held that defendants had violated the equal protection clause of the Fourteenth Amendment based on its finding that the hiring criteria used, and in particular the civil service examination, produced a disparate adverse impact and were not sufficiently job related. See *Castro* v. *Beecher,* 334 F. Supp. 930 (D. Mass. 1971). On appeal, the United States Court of Appeals for the First Circuit affirmed as to liability but remanded for entry of a preferential hiring remedy. See *Castro* v. *Beecher,* 459 F. 2d 725, 737 (1st Cir. 1972).

On remand, the defendants agreed to a consent decree providing for priority hiring of a specific group of minority applicants who had passed the 1972 examination. *Castro* v. *Beecher,* 365 F. Supp. 655 (D. Mass. 1973). In 1975, the decree was reformulated to provide for the hiring of one

[1] In addition, because the complaint was filed and the case was tried before the 1972 amendments to Title VII extended the statute's coverage to government employees, there was no claim that Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, had been violated.

minority policeman for each white policeman, with this system to continue until Boston achieved "a complement of minorities commensurate with the percentage of minorities within the community." See *Castro* v. *Beecher,* 522 F. Supp. 873, 875 (D. Mass. 1981). Since preferential hiring began in 1973, approximately 46% of the new hires have been minorities; as a consequence, the representation of minorities increased from the 2.3% level in 1970 to 11.7% in July, 1981. However, in the intervening decade the minority population in Boston increased to 30%, leaving the percentage of black and hispanic police officers "far below . . . the parity level which the Court's prior remedial orders were designed to achieve." *Id.* at 876.

In the spring of 1981, due to a tax reduction initiative, the City of Boston proposed to reduce the size of its police force. Under Massachusetts law, layoffs of civil service employees, including police officers, must be conducted on a last hired-first fired basis. See Massachusetts General Laws, Chapter 31, 33, 39. If the reduction in force had been carried out in accordance with state law, it would have reduced the percentage of minorities in the Boston police force to 6.2%.

On plaintiffs' motion, the district court modified the consent decree to prevent this result, superseding the state seniority system by establishing segregated seniority lists. Layoffs are to be conducted on the basis of these segregated lists so as to maintain the July 6, 1981 level of 11.7% minorities in the force. Under the court-ordered scheme, white officers with as much as eleven years service were laid off; by contrast, the most senior minority officers laid off had been hired in June of 1980. *Boston Chapter, NAACP* v. *Beecher,* 679 F. 2d 965, 976 n.14 (1st Cir. 1982).

On appeal, the First Circuit affirmed, holding that the past discrimination created a "compelling need" for a race-conscious remedy and that the district court's modification of the decree was reasonable because it was "necessary to prevent the

department[ ] from regressing to the state of precipitous racial imbalance that prevailed" when the litigation began in 1970. *Id.* at 977.

SUMMARY OF ARGUMENT

At the outset, it should be noted that modification of the state seniority system was not based on a finding by the district court that the reductions in force of the Boston police department were racially motivated or that the seniority system itself unlawfully discriminated against minorities. Rather, the courts below approved the modification solely as a necessary extension of the quota remedy approved in 1973. We submit that in modifying the consent decree to require a racially segregated seniority system the district court erred in at least three material respects.

First, on the basis of the record before it, the modification was beyond the court's remedial powers. A court cannot intervene if, after racial discrimination has been eliminated, new circumstances unrelated to any type of discrimination decrease the number of minority employees in the work-force. *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976). Before it modified the decree in this case, the district court should have at least held a hearing to determine whether discrimination had been eliminated and whether the lay-offs themselves were improper.

Second, the implementation of a racially segregated seniority system was a clear abuse of the court's equity power. Retroactive seniority is a type of relief that may be given only to identifiable victims of discrimination; it is an abuse of discretion to grant such seniority on a class-wide basis to all newly hired minority employees. *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977). Furthermore, this Court has consistently held that in fashioning a race-conscious remedy, the effects of the remedy on non-minority employees must be weighed. In this case, officers with as much as eleven

years' seniority lost their jobs so that minority officers who had been on the force for as little as two years could keep theirs. Such specific and drastic harm cannot be justified on the ground that it is good social policy to have proportional representation of every racial group in the police force.

Third, the quota remedy that the modification was designed to protect is itself suspect. A continuing remedy such as an injunction must be based on an appropriate finding of liability. If a change in the law indicates that liability was in fact wrongly determined, then the person burdened with the injunction is entitled to a modification as a matter of law. *System Federation* v. *Wright,* 364 U. S. 642 (1961). *Washington* v. *Davis,* 426 U. S. 229 (1976), makes it clear that a public employer is liable under § 1983 only for purposeful discrimination and therefore that a quota remedy cannot be employed absent such a finding. Under these circumstances, it was improper to extend the remedy even further by granting retroactive class-wide seniority.[2]

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[2] This is not to suggest that there was in fact no intentional discrimination practiced in hiring police officers in Boston prior to 1970; however, plaintiffs failed to plead or prove purposeful discrimination.

ARGUMENT

I. The Grant of Class-Wide Retroactive Seniority Was Beyond the Court's Remedial Powers.

The rationale given by the courts below for disregarding the seniority provisions of Massachusetts' civil service law was their desire to maintain each minority's proportionate share of jobs on the police force so that the numerical gains achieved through eight years of quota hiring would not be lost. This rationale cannot, as a matter of law, support the modification of the decree.

In *Pasadena* v. *Spangler*, 427 U. S. 424 (1976), this Court dealt with a situation where schools desegregated by court order had become racially imbalanced once again through population shifts that had not been found to be the result of actionable discrimination. The Court held that a federal court had no power to issue a remedy designed to correct such an imbalance. In so holding, the Court relied on its earlier determination in *Swann* v. *Board of Education*, 402 U. S. 1, 24 (1971), that there is no "substantive constitutional right [to a] particular degree of racial balance or mixing." Thus, once the constitutional violation has been remedied, a court has no power to issue additional decrees in order to maintain racial proportionality.

The same analysis applies here. The first consent decree in this case, which was entered into in 1973, established two priority pools of minority applicants, one for applicants who had actually suffered discrimination prior to 1972 and one for new applicants who may have been discouraged from applying by the discriminatory tests and recruiting practices in effect prior to 1972. Assuming (and there is no evidence in the record to the contrary) that hiring decisions were made in accordance with this decree, it appears that the past effects of dis-

crimination were remedied insofar as identifiable victims were concerned. In addition, there has been no finding of further discrimination in hiring since the decree went into effect; on the contrary, from 1973 to 1981, almost half of the new officers hired were members of minority groups, raising the percentage of minorities on the force to 11.7%. Finally, there was also no finding that the reductions in force ordered in 1981 were purposefully discriminatory or that the seniority system mandated by state law was anything but bona fide. Thus, the record would indicate that discrimination in hiring has ended and, although layoffs under the seniority system would cut the percentage of minorities in the workforce in half, these layoffs would not in and of themselves constitute actionable discrimination.[3]

Under the rationale adopted in *Spangler*, the district court therefore had no power to issue further orders to "remedy" the drop in minority representation on the force, no matter how unfortunate that drop might seem. The only way to avoid this result on the current record is to take the position that because racial proportionality had not been achieved by 1981, discrimination had not yet been eradicated. This position, however, would give minorities a perpetual right to a proportionate share of the jobs in the Boston police department. For if the court had the power to act here, eight years after the decree went into effect, then it would presumably have the power to order new remedies whenever the percentage of minority officers fell below their percentage in the general population for any reason.

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[3] It is well settled that intentional discrimination must be shown before a public employment practice having a disparate impact on minorities will be considered a violation of either § 1981 or § 1983. See *General Building Contractors Ass'n* v. *Pennsylvania*, 102 S. Ct. 3141 (1982); *Washington* v. *Davis*, 426 U. S. 229 (1976). While Title VII provides remedies for some types of unintentional discrimination, § 703(h) specifically preserves seniority systems unless they are purposefully discriminatory.

Such a result would be utterly inconsistent with *Spangler* itself, which denies any claimed constitutional right to racial balance. It would also be inconsistent with the concept of individual opportunity that our Constitution and civil rights laws embody. As the Court stated in *Los Angeles* v. *Manhart,* 435 U. S. 702, 708 (1978), with respect to Title VII: "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class."

Finally, the approach adopted by the lower courts would revive the proposition, already rejected by this Court, that each identifiable ethnic and racial group is "entitled" to a measurable share, and only that share of public jobs. As the Court stated in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579 (1978):

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

While an integrated police force is surely desirable, the police force should be truly integrated. Boston should not have a black police force for its black community, an Irish police force for its Irish Community and an Italian police force for its Italian community. *DeFunis* v. *Odegaard,* 416 U. S. 312, 342 (1974) (Douglas, J., dissenting).

Because of its reliance on the concept of racial proportionality, the district court failed to consider whether in fact all identifiable victims of past discrimination had been adequately protected, whether discrimination in the department had been eliminated by 1981, and whether the layoffs themselves con-

stituted a new violation. At the least, this Court should remand for consideration of those issues, which are crucial to a determination of whether the district court had the power to take *any* remedial action in response to the planned layoffs.

II. The District Court Abused Its Discretion by Extending Retroactive Relief to the Entire Class of New Hires.

The courts below also erred in this case by treating the grant of retroactive, class-wide seniority as a virtually automatic response to the proposed reductions in force. The establishment of segregated seniority lists to be used in pursuing large-scale cutbacks was a drastic expansion of the consent decree which should have been analyzed on the basis of the principles ordinarily applied to a court's exercise of its equitable powers. When those principles are applied, it is clear that the district court exceeded its power.

A. The District Court Failed to Distinguish Properly Between Prospective and Retroactive Relief.

In granting class-wide retroactive seniority, the courts below failed to recognize the crucial distinction between prospective and retroactive relief. While courts have often exercised broad discretion in formulating prospective remedies (such as those involving hiring policies), retroactive remedies (such as an award of retroactive seniority rights) are governed by a stricter standard. In *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 365 (1977), this Court specifically limited retroactive seniority to identifiable victims of discrimination. The Court thus held that a lower court decision to grant retroactive seniority on a class-wide basis to every minority employee was improper; instead, this Court held that retroactive relief should have been limited to those persons who in the past had actually applied and been rejected or who had been discouraged from applying because of the discrimination.

Although this is not a Title VII case, the same limits on the courts' power apply here. As the Third Circuit stated in *Gurmankin* v. *Costanzo,* 556 F. 2d 184, 188 (3rd Cir. 1977), "There is no distinction in the law of equitable remedies under Title VII and suits brought in reliance on 42 U. S. C. § 1983, or directly on the fourteenth amendment."

The first consent decree approved in this case in 1973 provided for a series of priority hiring pools. Group A consisted of all minority applicants who had failed the examinations given from 1968 through 1970, but had passed the 1972 examination. Applicants from Group A were to be hired on a one-for-one basis with applicants from Group B, who were all those (white) applicants certified as eligible in 1970 and 1971. Once Group A was exhausted, persons in Group C, which was made up of minority applicants who had never taken the examination before, but had passed the 1972 examination, could be hired, on the basis of one from Group C for every three from Group B. Once all three groups were exhausted, the department could hire from Group D, which consisted of all other (white) candidates who had passed the 1972 examination.

Thus, Group A consisted of those who had been discriminated against. In the district court's view, Group C was also a class of victims, those whose desire to apply for an opening as a police officer may have been chilled by prior discriminatory practices. *Castro* v. *Beecher,* 365 F. Supp. 655, 660 (D. Mass. 1973). If, in 1981, officers in either Group A or Group C were to be laid off, the district court had the power to consider whether under *Teamsters* they were entitled to retroactive seniority.

In 1975, the consent decree was reformulated to extend the quota hiring concept to new minority applicants. There is nothing in the record to suggest that these individuals had ever suffered discrimination or had been discouraged from applying

earlier because of discrimination. Therefore, under the *Teamsters* analysis, the district court erred by giving retroactive seniority to these applicants as well.

If the Court determines that the liability issue should not be re-examined (see part III, below), it should remand for a determination of whether retroactive seniority should be granted to specific, identifiable victims of discrimination.

B. The Courts Below Failed to Balance the Equities Properly.

The granting of class-wide, retroactive seniority was also erroneous because the courts failed to properly weigh the harm that such a remedy inflicted on white officers. As Justice Powell stated in his concurring opinion in *Fullilove* v. *Klutznick, supra,* 448 U. S. at 514,

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties."

Here, the court failed to perform "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *International Brotherhood of Teamsters* v. *United States, supra,* 431 U. S. at 372.

In cases where this Court has approved race-conscious remedial programs, the "expectations" that were frustrated have involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. In those cases the Court has determined that any injury to white employees' expectations of future benefits has been counterbalanced by the need to counteract prior pervasive discrimination. Thus, in *United Steelworkers of America* v. *Weber,* 443 U. S. 193 (1979), white employees were foreclosed from applying for half of the openings in a new craft training program established specifically to remedy the past effects of

segregation in certain job categories. The Court noted that white employees could still compete for the remaining half of the openings and that, in any event, the plan was "a temporary measure" to eliminate "conspicuous racial imbalance in traditionally segregated job categories." The plan did *not* require the "discharge of white workers and their replacement with new black hirees." Under these circumstances, the Court found that the plan did not "unnecessarily trammel the interests of the white employees." 443 U. S. at 208.

Similarly, in *Fullilove* v. *Klutznik, supra,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. This was also a temporary and limited measure. In his concurring opinion, Justice Powell concluded that any "marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U. S. at 515.

In addition, it should be noted that neither *Weber* nor *Fullilove* involved a court-ordered remedy. *Weber* was a voluntary affirmative action plan; *Fullilove* involved the power of Congress under § 5 of the Fourteenth Amendment to spend federal funds in a way that would tend to redress past intentional discrimination. In both cases, the Court recognized that imprecision in the means of remedying the past discrimination could be tolerated.

Here, by contrast, it is a court-ordered remedy that is at issue. It is well-settled that in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved, *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 420 (1977); see also *General Building Contractors* v. *Pennsylvania, supra,* 102 S. Ct.

at 3154. Furthermore, unlike the "temporary" measures at issue in *Fullilove* and *Weber*, here the court's remedial efforts have already lasted for eight years and are likely to continue long into the future as it strives to achieve the goal of racial proportionality.

Most importantly, in this case significant burdens have been imposed on employees solely because they are white: eleven-year veterans on the force have lost their jobs as a result of the court's order, so that minority officers with less than two years' seniority can remain on the job. There is no indication that such a burden was necessary to protect minority officers who would have enjoyed more seniority but for discrimination prior to 1973.[4] Instead, the only countervailing consideration relied upon below was the court's unilateral determination that it is good social policy to have a police force that precisely reflects the proportion of various racial groups in the community. As the court stated,

> "An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent. We are concerned here not with simply redressing the rights of individuals who suffered racial discrimination; the issue is whether the progress made to date in integrating the departments will be preserved. As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F. Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those depart-

[4] As noted above, how much retroactive seniority must be given to protect any victims of discrimination is an issue that the district court should be directed to consider on remand.

ments. The inevitable result is poor police and fire protection for those who need it most."[5]

Certainly one can question the court's view, which is unsupported by any evidence, that racial proportionality is necessary to the effective functioning of the police department. Furthermore, the Court of Appeals ignored significant policy considerations on the other side. While it is true, as the First Circuit itself noted, that there is nothing magical about the use of a seniority system to decide who is to be laid off, that is the system chosen by state law.[6]

Moreover, under Title VII, Congress has specifically protected seniority systems under circumstances similar to those here. Thus, a bona fide seniority system is valid even though minority workers as a group may have less seniority as a result of pre-Act discrimination. A court has no power under Title VII to ignore such a system in order to eliminate the past "effects" of discrimination. See *Teamsters* v. *United States, supra,* 431 U. S. at 348-355.

A more fundamental question, however, is whether a court may treat racial proportionality as an important countervailing interest. We submit that it may not. Again, the Constitution focuses on the protection of individual rights—not the allocation of benefits and burdens among groups. Remedies must be similarly focused on providing equal opportunity for individ-

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[5] It is interesting to note that in the passage cited, Judge Wyzanski, while commenting on the importance of having all groups represented on the police force, specifically stated that "This does *not* imply that any group is entitled to a quota, nor to a fraction roughly corresponding to the fraction of the total population which belong to that group." 365 F. Supp. at 659 (Emphasis in original)

[6] Like the Court of Appeals, we do not believe that a seniority system must necessarily be used in deciding who should be laid off. However, any system that is selected must be rational and racially neutral in its application. The fact that a disparate impact results from the application of such a system does not necessarily make it invalid or unlawful.

uals. Giving preferences to various groups on the basis of their race postpones rather than hastens the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin," *Fullilove* v. *Klutznick, supra,* 448 U. S. at 516 (Powell, J.) As Justice Powell observed in *University of California Regents* v. *Bakke,* 438 U. S. 265, 298 (1978):

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

Thus, the court's belief that racial proportionality in the police force was desirable was not a factor that could properly be taken into account. Since no other countervailing considerations were cited, the balance clearly tipped in favor of the officers with seniority, who were singled out by state law for protection, not on the basis of their race, but rather on the racially neutral basis of length of service.

III. Modification of the Consent Decree Was Inappropriate in Light of Intervening Changes in the Law With Respect to Liability.

There is no question but that the district court had the power to modify its injunction because of changed circumstances. Normal principles of *res judicata* do not apply to continuing injunctions. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.,* 286 U. S. 106, 114 (1932).

The problem in this case is that the only new "event" considered by the district court was the change in factual circumstances brought about by the Boston fiscal crisis. Although the matter was called to its attention, the district court failed to consider, or at least failed to give proper weight, to the change in legal circumstances wrought by *Washington* v. *Davis,* 426 U. S. 229 (1976).

In *Washington* v. *Davis,* the lower court held that unintentional discrimination in the hiring of police officers for the District of Columbia police department violated the equal protection component of the Due Process Clause of the Fifth Amendment.[7] This Court reversed, holding that "proof of discriminatory racial purpose," is necessary to establish a violation of equal protection guarantees. *Washington* v. *Davis,* 426 U. S. 229, 245 (1976). In the course of its opinion, the Court specifically cited *Castro* as exemplifying a theory of the equal protection clause with which it disagreed. See 425 U. S. 229, 244 n.12, 245 (1976).[8]

The initial finding of liability in this case was therefore in error. It follows that the remedial scheme predicated upon that initial finding is similarly flawed. The remedial powers of the federal courts may "be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and extent of that violation." *General Building Contractors* v. *Pennsylvania,* 102 S. Ct. 3141, 3154 (1982). See also

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[7] As in this case, the plaintiffs in *Washington* v. *Davis* complained of the use of hiring criteria and particularly of an entrance examination that had a disparate adverse impact on minority applicants and was not sufficiently job-related. Again as in this case, the complaint was filed before Title VII was extended to government employees, and therefore it too was tried solely on a constitutional theory.

[8] In its 1972 opinion in this case, the First Circuit "acknowledged that there was no claim or evidence that defendants had a discriminatory purpose or pursued any practice that was discriminatory on its face." *Castro* v. *Beecher,* 459 F. 2d 725, 728 (1st Cir. 1972). See also *Castro* v. *Beecher,* 334 F. Supp. 930, 935 (D. Mass. 1971). Liability was premised on the theory that the standard for liability under the equal protection clause was the same as that set forth in *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), as applicable under Title VII and that proof of discriminatory purpose was unnecessary. See *Castro* v. *Beecher,* 459 F. 2d 725, 732-33 (1st Cir. 1972). This was precisely the theory rejected by this Court in *Washington* v. *Davis.*

Hills v. *Gautreaux*, 425 U. S. 284, 293, 294 (1976). In this case the legal principles underlying the court's finding of a violation of law were repudiated and hence there is no basis for a remedy. As this Court recently held in *General Building Contractors, supra*, 102 S. Ct. at 3155, "the imposition of minority hiring quotas [is not] the sort of remedy that may be imposed" "[a]bsent a supportable finding of liability."

Given the change in law announced in *Washington* v. *Davis*, there is considerable authority that petitioner was entitled, as a matter of right, to have the decree vacated in its entirety. It necessarily follows that the district court erred when, without making the finding of purposeful discrimination required by *Washington* v. *Davis*, it not only maintained its remedial plan but enlarged upon it.

The leading case on modification of consent decrees because of changes in legal circumstances is *System Federation* v. *Wright*, 364 U. S. 642 (1961). There, non-union railroad workers brought suit against a number of railroads and unions charging them with discrimination in violation of the Railway Labor Act. At the time of the suit the Railway Labor Act forbade discrimination against non-union employees through the negotiation of union shop agreements. The suit was settled by a consent decree which prohibited the defendant unions from negotiating such agreements. Thereafter, however, Congress amended the Railway Labor Act to permit union shop agreements. Some six years later, the unions petitioned the district court, which had retained jurisdiction, to modify the consent decree to eliminate the prohibition. After a hearing, the district court denied the petition on the ground that the unions were bound by their original agreement and that permitting union shop agreements would lead to discrimination against the plaintiff non-union employees.

This Court reversed. Although noting that petitions for modification are normally addressed to a court's discretion, the

Court held that where there has been a change in law destroying the legal basis for the original decree, modification is a matter of right. The Court rejected the district court's theory that modification could be denied because union shop agreements would lead to impermissible discrimination against the non-union plaintiffs. The Court held that in determining what forms of discrimination were impermissible and therefore subject to its continuing remedial powers, the district court was bound to consider the law as it then stood, not the law as it existed at the time of the original decree or the district court's own notion of the equities. Finally, the Court rejected the argument that modification could be denied because the defendant unions were bound by their original agreement: "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Id.* at 651. "The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 652.

The same principles govern here. As in *System Federation,* the district court here was trying to provide a remedy for a form of discrimination—in this case pre-Title VII unintentional discrimination—that was considered illegal at the time of the original decree but which, due to intervening changes in the law, has since been recognized as permissible. Here, too, as in *System Federation,* the remedy protects non-existent rights by depriving petitioners of rights conferred upon them by statute—in this case rights accruing under the Massachusetts seniority system. The remedy in *System Federation* had become improvident because of changes in legal circumstances; it is equally improvident here. Moreover, in *System Federation* the defendants sought to vacate the initial decree entirely; here, petitioners ask only that it not be enlarged.

The conclusion that a continuing remedy that has become inappropriate because of intervening changes in the law should be modified is reinforced by this Court's decision in *Pasadena City Board of Education* v. *Spangler, supra,* 427 U. S. 424. In *Spangler,* the Court rejected the suggestion by one Court of Appeals judge that the school board was barred from seeking a modification by its failure to appeal the 1970 decree. The Court noted that its intervening decision in *Swann* v. *Board of Education,* 402 U. S. 1 (1971), had specifically rejected the notion that annual adjustments in the schools' racial composition could be ordered to prevent *de facto* segregation. This, plus the fact that the parties had not understood the decree in 1970 to contain an annual adjustment feature, made a "compelling case" for modification under the *System Federation* rationale. 427 U. S. at 438.

As in *Spangler,* the change in legal circumstances since the original decree has made the district court order enlarging that decree improvident as a matter of law and puts the enlargement of the decree to include retroactive seniority beyond the courts' remedial power.

CONCLUSION

The Anti-Defamation League deplores the continued existence in this country of discrimination based upon race, religion, sex and perceived national or ethnic origins. Not until such discrimination is eliminated will the United States be in fact a nation where all citizens enjoy equal opportunities, as they should. However, remedies like the one imposed in this case, which attempt to parcel out benefits and burdens to racial groups on the basis of their proportionate share of the population, do not promote equal opportunity; rather, they foster an arbitrary and divisive focus on race and ethnic origin, instead of on the individual and individual merit. The lower courts' decision to mandate a segregated seniority system in order to preserve the "progress" that had been made toward achieving proportionate representation of minorities in the police force is particularly disturbing, as it seems to foreshadow a permanent concern with allocating benefits and burdens proportionally among identifiable groups on the basis of race or ethnicity, rather than fairly among individuals. No matter how benign or laudable the purpose, the result of such remedies will be further division and discrimination. As Professor Bickel stated in The Morality of Consent, 133 (1975),

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

For this reason and the reasons stated above, the judgment of the courts below should be reversed or, alternatively, the case should be remanded for further findings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

BOSTON POLICE PATROLMEN'S ASS'N, INC.,
Petitioner,

v.

PEDRO CASTRO, *et al.*

NANCY B. BEECHER, *et al.*,
Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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U.S., Commission on Civil Rights, Who Is Guarding the Guardians: A Report On Police Practices (1981), p.... 12

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Nos. 82-185, 82-246, 82-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

==========

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

v.

BOSTON CHAPTER, NAACP, et al.

==========

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,

Petitioner,

v.

PEDRO CASTRO, et al.,

==========

NANCY B. BEECHER, et al.,

Petitioners

v.

BOSTON CHAPTER, NAACP, et al.

==========

On Writs of Certiorari to the United States Court of Appeals For The First Circuit

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BRIEF FOR THE CITY OF DETROIT AMICUS CURIAE IN SUPPORT OF RESPONDENTS

==========

Interest of Amicus

The City of Detroit has suffered

adverse consequences because of prior discriminatory practices of its public safety agencies particularly its Department of Police and a failure to correct the effects of that discrimination. For the past nine years Detroit has implemented affirmative action plans to eradicate the effects of past discrimination against minorities and the debilitating effects of that discrimination on the ability of its public safety agencies to operate effectively. The outcome of this case may have a crucial impact on the lawfulness of those plans. Presently pending in the lower courts are two cases brought on behalf of white police officers which challenge the lawfulness of Detroit's race-conscious affirmative action plan in the police department. See Detroit Police Officers Assn. v. Young, 608 F.2d 671 (6th Cir. 1979) cert. denied, 452 U.S.

938 (1981) and Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979). In a third lawsuit, NAACP, Detroit Branch v. Detroit Police Officers Assn., 525 F. Supp. 1215 (E.D. Mich. 1981) the City and the union representing police officers are being sued for failure to agree on workable alternatives to the collectively bargained reverse seniority sequence order of lay-offs. That failure has had the effect of undoing some of the hiring gains achieved through implementation of the City's affirmation action plan. We believe that Detroit's experience with undoing the effects of longstanding racial discrimination by means of affirmative action may provide an important perspective to the issues presented in this case.

SUMMARY OF ARGUMENT

This case raises important questions concerning the discretion of a district

court to preserve gains made pursuant to a remedial consent decree where fiscal considerations require a municipal government to achieve economies. In this case the employer elected initially to effectuate these economies through the expedient of layoffs which, under state law, could only be made in reverse sequence seniority.

After the district court barred layoffs in a manner which adversely affected minorities and which undid gains made under nearly a decade of court ordered remedies, the employer managed to solve its financial problems without laying off any employees. If, as petitioners argue, the district court were stripped of its equitable powers, then the catalyst -- the order of the district court -- to a creative solution which averted layoffs would have been absent. Moreover, important public safety benefits derived from having

public safety institutions which reflect the racially diverse character of the community served would have been sacrificed. Neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. nor the Fourteenth Amendment of the United States Constitution requires a result that would strip a district court of the power to preserve remedial gains particularly where, as here, larger public interests are at stake.

I. THE DISCRETION EXERCISED BY THE DISTRICT COURT IN THIS CASE SERVED TO FACILITATE CRITICALLY IMPORTANT PUBLIC SAFETY CONSIDERATIONS

Petitioners' contention that the seniority expectations of non-minority officers may not be upset except to the extent necessary to slot in proven victims of unlawful racial discrimination,[1/] see

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1/ Some of the amicus briefs filed on behalf of petitioners take similar

e.g. Brief of Petitioner Boston Police Patrolman's Assn., at 18, would stifle

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1/ continued

positions. See, e.g., Brief For The United States, 20. This claim on the part of the United States contrasts sharply with positions it has taken in the past in this Court. For example in Minnick v. California Dept. of Corrections, No. 79-1213, at p. 20, the United States and the Equal Employment Opportunity Commission advised this Court that:

> [a] state agency is not confined merely to seeking to identify individual victims of past discriminatory decisions and, if it finds them, affording relief on a case-by-case basis. As Congress so plainly recognized when it extended Title VII to state and local governments, the effects of employment discrimination in this setting extend well beyond the loss of employment opportunites by particular individuals. Such discrimination deprives the agency of the perspective of minority persons regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large, thereby perhaps deterring minorities from full participation in government programs; and it sets a highly visible example of

efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens as a result of long-standing policies and practices of exclusion of minorities from employment in such agencies. Reliance on reverse seniority sequence layoffs as the only means of addressing Boston's fiscal crisis would serve to resegregate these agencies and thereby exacerbate existing racial tensions.

1/ continued

discrimination, or acquiescence in the results of past discrimination. In order to remedy these broader effects of discrimination, the agency may appropriately take measures designed to bring minority representation in its work force to the same percentage that obtains in the relevant labor market, and thereby to place the agency in the position it presumably would have been in had there been no discrimination.

When the first of these cases, Castro v. Beecher, Civil Action No. 70-1220-W, was filed, the existence of an on-going hostility between the Boston police and that city's minority community was immediately apparent and that hostility affected the willingness of minority citizens to apply for employment. See Castro v. Beecher, 334 F. Supp. 930, 936 (D. Mass. 1971) and 365 F. Supp. 655, 659 (1973). The district court recognized the need to end this unfortunate alienation between citizens and the police as well as the general positive effect on the public interest to be achieved by a police force which reflects the racial diversity of the community.

See, e.g., Castro v. Beecher, 365 F. Supp. 659 and 522 F. Supp. 873, 877 (1981). Moreover, the First Circuit stated:

> We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility, and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it the most. 679 F.2d at 977.

Other courts of appeals have agreed with the First Circuit.[2/] The Sixth Circuit recently collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable.

2/ See Detroit Police Officers Assn. v. Young, 608 F.2d 671, 695 (6th Cir. 1979); Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981); Bridgeport Guardians Inc. v. Members of the Bridgeport Civil Service Comm., 482 F.2d 1333, 1341 (2d Cir. 1973).

The operational need to have a minority presence in public safety agencies that is representative of the miniority population of the community served:

> is based on law enforcement experience and a number of studies conducted at the highest levels. E.g., National Advisory Commission on Criminal Justice Standards and Goals, Police (1973); National Commission on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Insure Domestic Tranquility (1969); Report of the National Advisory Commission an Law Enforcement and Administration of Justice, Task Force Report: The Police (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See To Establish Justice, supra at 145; Report on Civil Disorders, supra a 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. Report on Civil Disorders, supra at 301; Task Force Report: The Police, supra at 144-45, 167; Police, supra at 330.
>
> These national commissions recommend the recruitment of additional numbers of minority police

officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." Report on the Causes of Crime 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Detroit Police Officers Assn., 608 F.2d at 695. More recently completed studies have reached the same conclusion. In a report, published in October 1981, the United States Commission on Civil Rights found:

> Finding 2.1: Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively

> in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

U.S. Commission on Civil Rights, Who Is Guarding the Guardians: A Report On Police Practices 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida the U.S. Civil Rights Commission observed:

> In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice.

U.S. Commission on Civil Rights, Confronting Racial Isolation In Miami 290 (1982).

Congress was acutely aware of the deleterious community effect of maintenance of segregated employment patterns in government and it identified the need to remedy this condition as one of the pur-

poses of the 1972 amendment to Title VII. When Title VII was amended in 1972 to cover state and local governments, the accompanying Report of the Senate Committee on Labor and Public Welfare stated that

> The failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies. . . . Discrimination by goverment therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971). Congress was particularly concerned with protecting the operational ability of police departments to provide effective law enforcement.

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those government activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated. H. R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of the bill in the Senate, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units" 118 Cong. Rec. 789-811 (1972), reprinted in EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1116 (hereinafter 1972 Legislative

History.) The Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." Id. As Senator Williams succinctly phrased the matter, "if they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." Id. This expressed Congressional solicitude for protecting the ability of local governmental units to carry out their essential functions requires a construction of Title VII that permits use of racial criteria, when needed, to assist in the provision of public safety services.

Amicus has experienced -- and federal court records document, see Baker, 483 F. Supp. at 996-97 -- racially-based police community tensions caused in substantial

part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943 and 1967 as well as several other less noted civil disturbances before and after 1967 were just one of the many manifestations of the breakdown of police community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover the widespread belief in Detroit's black community that the police lacked interest in investigating black on black crime resulted in a loss of essential black citizen cooperation in the police department's crime fighting efforts.[3/] Id. See Baker 483 F. Supp. at 996-97.

3/ In the appendix to this brief we have reproduced the district court's fuller description of these events. See Appendix pp. 1a-5a.

The willingness of amicus to recognize and act on the destructive consequences of failure to correct the extreme under-utilization of black officers came painfully. The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. See 483 F. Supp. 946. Between 1967 and 1973 some efforts were made to recruit, hire and promote blacks, but these efforts were not successful. 483 F. Supp. at 447-52. In the interim the City continued to hemorrhage. See 483 F. Supp. at 996-99. Finally, in 1974, the City adopted a voluntary affirmative action plan of hiring and promotion. These efforts have resulted in dramatic improvements in the ability of amicus to deliver effective police service.

In Baker the district court detailed

these improvements and concluded:[4/]

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department -- at all levels -- reflect the City's population.

483 F. Supp. at 1000.

In the experience of amicus the ability to make race conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's public safety agencies and to facilitate Detroit's ability to protect the lives and property of its people. See id., 483 F. Supp at 999.

4/ We have set forth in the appendix, pp. 5a-8a, the full text of the portion of the opinion detailing these improvements.

Detroit, and we suspect all municipalities, approached the point of decision slowly and with maximum caution, for the path to that decision and the road beyond it are covered with political, practical and legal obstacles.[5/] As the district court's summary of the breakdown of police community relations in Detroit shows,

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5/ For example, amicus has attempted to implement an affirmative action plan in its fire department. Initially we were unable to proceed because of an archaic City Charter provision which required that promotions up to the rank of Deputy Fire Commissioner be filled on the basis of seniority. See Detroit City Charter, § 7-806. As a result that department was saddled with many undistinguished and unproductive supervisors at virtually all levels. This system of advancement served primarily to perpetuate the prior racially exclusionary practices of that department. Cf. Van Aken v. Young, 28 F.E.P. Cases 1669 (E.D. Mich 1982). After several years of effort the voters approved a charter amendment which substituted a merit system for promotions. Despite this change the City has not been able to implement the new merit plan due to an ongoing arbitration proceeding instituted by the union which represents firefighters.

the human and financial costs of that delay were enormous. We submit that without the presence of a perceived legal duty to correct prior discrimination and the threat that a federal court might impose tough remedial obligations as a result of the City's failure to act, it would have been virtually impossible for amicus to take the necessary affirmative action steps it took in 1974 to correct prior racial discrimination and its debilitating effects.

II. THE DISTRICT COURT'S ORDER IS THE MOST FLEXIBLE AND LEAST INTRUSIVE MEANS OF ACHIEVING THE GOALS OF TITLE VII

As this Court has repeatedly noted, a critical purpose of Title VII is "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (citation omitted), and to "eliminate

the discriminatory effects of the past as well as bar like discrimination in the future," id. (quoting Louisiana v. United States, 380 U.S. 145 (1965)).

The District Court's order represents an attempt to salvage the limited progress made toward achievement of these goals. The public safety crisis caused by the exclusion of minorities from the police and fire departments is clearly a vestige of the City's prior discriminatory conduct. In view of the legislative history of the 1972 Act, discussed above, it is clear that Title VII mandates that the District Court eliminate this vestige. Similarly, the District Court had to devise a means of overcoming the reluctance of minorities to apply for employment with these City agencies in order to eliminate the discriminatory effects of the past and prevent

future discrimination.[6]

Title VII gives district courts broad powers to achieve these goals. Section 706(g) authorizes the courts to order "such affirmative action as may be appropriate," as well as "any other equitable relief as the court deems appropriate." Clearly, these provisions are sufficient to encompass both the original hiring goals incorporated into the consent decree and the layoff order now at issue.[7]

6/ See, e.g., Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc) cert. denied, 406 U.S 950 (1972).

7/ A court of equity may modify a decree of injunction even though it was entered by consent, and whether or not the power to modify was reserved by its terms. United States v. Swift and Company, 286 U.S. 106 (1932). This expression of the inherent authority of a court to enforce its own decrees is frequently noted throughout the case law, generally, in civil rights cases, United States v. Hall, 472 F.2d 261 (5th Cir. 1972), and in cases

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7/ continued

involving the enforcement of consent decrees under Title VII, EEOC v. Longshore (ILA), Locals 829 and 858, ____ F. Supp. ____, 9 E.P.D. ¶ 10,159 (D. Md. 1975). In EEOC v. Plummer & Pipefitters Local 189, 438 F.2d 408, 414 (6th Cir. 1971), the court asserted:

> And beyond question, the district court had authority either sua sponte or on petition to reshape its injunction so as to achieve its original and wholly appropriate purpose. (citation omitted).

See also United States v. United Shoe Machinery Corp., 391 U.S. 244, 251 (1968) (district court had the power to modify its decree entered ten years earlier, where the decree had not achieved the adequate relief to which the government was entitled).

While this exercise of a Court's power to protect the efficacy of its orders is commonly viewed as an expression of the court's inherent authority, United States v. Swift & Co., supra; United States v. United Shoe Machinery Corp., supra, the All Writs Act, 28 U.S.C. § 1651, offers another basis for this authority. Under the All Writs Act a federal court may issue such commands as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued, even if they extend to persons "not partners to the original action or engaged

In this case a municipal employer entered into consent decrees following specific judicial findings of past discrimination. In upholding the district court's imposition of color-conscious relief, the First Circuit held that the remedy went "no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities." Boston Chapter, NAACP, Inc. v. Beecher, et al., 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

In subsequent rulings, now before this Court for review, the district court

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7/ continued

in wrongdoing" United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). See also, Harris v. Nelson, 394 U.S. 266, 299 (1969); Adams v. United States ex rel McCann, 317 U.S. 269, 273 (1942).

and the Court of Appeals imposed a modification of those decrees which would allow the City of Boston to respond to its unforeseen fiscal restraints, subject only to a reasonable deference to its obligations under the decrees. In so doing, the district court, working within the context of a judicially imposed consent decree and a state statute governing the manner of layoffs for the affected agencies,[8/] achieved a modification that offered the defendants great flexibility in responding to the City's fiscal constraints. The court's order allowed the City to seek alternatives to layoffs, or, if layoffs were unavoidable and the state civil service statute proved in conflict with the ongoing judicial remedy, the order relieved the City from the operation of the statute

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8/ Mass. Gen. Laws c. 31, § 39.

on a limited and temporary basis in order to prevent nullification of prior court orders.

The district court restrained the defendant employer from implementing any program of reductions which reduced the level of minority firefighters or police officers below the level that had been obtained pursuant to the decree, i.e., 14.7 percent of all firefighters and 11.7 percent of all police officers.[10/] The district court did not order layoffs nor did it order any specific response to the fiscal problems of Boston. The flexibility and generality of the court's remedial order was effective. The State and City subsequently developed a plan which both alleviated the need for any layoffs and

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10/ Castro, 522 F. Supp. at 877.

incorporated the pre-layoff staffing patterns of the respective departments.

Moreover, the plan developed by the City and State was only one of several options available to the City under the court's order. For example, the presumed fiscal constraints of Proposition 2-1/2 could have been met via plans which included work sharing,[12/] pay reductions, or early retirements, none of which would

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12/ In recent years the concept of voluntary work-saving has received widening consideration as a fair and effective alternative to layoffs. For example, anticipating the layoff of thousands of public employees because of the passage of Proposition 13, California became the first state to adopt a Work Sharing Unemployment Insurance plan in 1978, § 1279.5 of the California Unemployment Insurance Code. This plan allowed California employers to reduce the work week instead of reducing the work force and further allowed each employee to get a pro rata share of unemployment compensation. Similar bills have been adopted in Oregon, House Bill 3306, Feb. 22, 1982, and Arizona, Senate Bill 1005 Jan. 1, 1982, and in 1982,

have reduced the percentages of minorities obtained under the decrees or required any conflict with the state civil service statute.

Indeed it was only if the city determined that layoffs were inevitable and that such layoffs "would allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since

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12/ continued
U.S. Representative Patricia Schroeder introduced the Short-Time Compensation Act, P.L. 92-248, Part of the Tax Equity Act of 1982, Section 194 which would achieve a similar result. See, Morand and McPherson, Union Leader Responses To California's Work Sharing Unemployment Insurance Program, Bureau of National Affairs, Daily Labor Report, Vol. 102, D. 1 (May 28, 1981). See also Leonard Greenhalgh, A Cost Benefit Balance Sheet for Evaluating Layoffs As A Policy Strategy, October 1, 1978 (study conducted under the auspices the State of New York and the Civil Service Employees Association).

1970"[13] that any interference with the operation of the statute would be required.

The district court did not hold that the civil service statute which established a reverse seniority system for layoffs of public employees was invalid. The court simply held that the implementation of the statute cannot eradicate the results gained over the past eleven years from the judicially imposed remedy.[14]

The district court specifically strove

13/ Castro, 522 F. Supp. at 877.

14/ Moreover, as noted by the court below, "remedies to right the wrong of past discrimination may suspend valid state laws." Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. See also, Louisiana v. United States, 380 U.S. 145 (1964); Carter v. Gallagher, 452 F.2d at 328. A "[s]tate law prohibition against compliance with the District Court's decree cannot survive the command to the Supremacy Clause of the United States Constitution." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

to limit the effect, if any, its order would have on the state statute. The order did not prohibit layoffs of members of either department. It did not bar the layoff of all minority officers. Moreover, notwithstanding the fact that the hiring goals of the original order had not yet been obtained, the order did not require any increase in minority representation.

On the contrary, the court settled for an order that merely prohibited the reduction of minority personnel below the levels which had been obtained pursuant to the prior operation of its decree. Thus the district court's order represents a careful balancing of interests of the City, the non-minority employees and the importance of preserving progress toward the goals of Title VII.

Consistent with the goal of maintaining the gains achieved by its remedial order, the district court paid maximum respect to the procedures and other preferences established by the state statute. Castro, 522 F. Supp. at 878, 879. The district court's allowance of strict statutory layoffs until the achieved levels were threatened, its establishment of separate lists and allowance of layoffs pursuant to those lists in reverse order and its provision for recall in reverse order of layoff, all follow the requirements of the statute.

III. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH SECTIONS 703(h) AND 706(g) OF TITLE VII

A. Statutory Preferences Are Not Protected by Section 703(h)

Section 703(h) of Title VII offers limited exemption from some of the require-

ments of Title VII for bona fide seniority systems. Section 703(h) has no applicability to the statutory preference established by Mass. Gen. Laws c.31, § 39. This is simply not a case in which expectations based upon collectively bargained seniority rights must be harmonized with the remedial requirements of Title VII. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); and American Tobacco Co. v. Patterson, ____ U.S. ____ 71 L.Ed.2d 748 (1982). Indeed the collective bargaining agreements between the unions and the Police and Fire Departments are silent on the method of layoffs. Here, a statutory provision, which incorporates a variety of preferences[15/] and which is subject to amendment or repeal by the

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15/ For example, one reason for layoffs of police officers hired as early as 1970,

Massachusetts legislature at any time, cannot be viewed as creating a bona fide seniority system.

The 1964 legislative history defines bona fide seniority systems as being synonomous with a collectively bargained agreement. For example, the House Minority Report on the Act[16/] explained its insistence on protection of seniority as follows:

> Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.
>
> The provisions of this act grant the power to destroy union seniority...
> ...
> To disturb this traditional practice is to destroy a vital part of unionism ... (emphasis in original)

15/ continued

was the absolute preference for veterans in the statutory layoff scheme. Mass. Gen. Laws, ch. 30 § 9A. See Brief For The United States As Amicus Curiae, In Support of Petitioners, 8.

16/ See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legisla-

This association of seniority and collective bargaining agreements was consistently expressed. For example, the Justice Department statement concerning Title VII, placed in the Congressional Record by Senator Clark[17] speaks specifically of seniority rights obtained pursuant to a "collective bargaining contact," Teamsters, supra, 431 U.S. at 351; a set of questions and answers introduced by Senator Clark references "last hired, first fired agreements"[18] 110 Cong. Rec. 7217 (1964; Franks, 424 U.S. at 760 n.16; Teamsters, 431 U.S. at 351 n.36.

The court also has consistentl, recog-

16/ continued

tive History of Title VII and XI of the Civil Rights Act of 1964, 2071 (hereinafter 1964 Legislative History).

17/ 110 Cong. Rec. 7207 (1964).

18/ This language was also adopted by Senator Dirkson. 110 Cong. Rec. 7212 (1964).

nized that Section 703(h) protects the variety of uses for seniority that are included as part of the process of collective bargaining.[19/] For example, in California Brewers Association v. Bryant, 444 U.S. 598, 608 (1980), the Court specifically refers to the ability of employers and unions to develop such systems:

> Significant freedom must be afforded employers and unions to create differing seniority systems.

Similarly, in American Tobacco Co., the Court specifically noted the "policy favoring minimal governmental intervention in collective bargaining," 71 L.Ed.2d at 760 n. 17, and several times underscored the inextricable relationship between seniority

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19/ Aaron, Reflections on the Legal Nature and Enforcement of Seniority Rights, 75 Harv. L. Rev. 1532 (1962). See also Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

systems and collective bargaining:

> Seniority provisions are of "over-riding importance" in collective bargaining, Humphrey v. Moore, 375 U.S. 335, 346, 11 L.Ed.2d 370, 84 S.Ct. 363 (1964), and they "are universally included in these contracts." Trans-World Airlines v. Hardison, 2264. See also Aaron, Reflections on the Legal Nature and Enforcement of Seniority Rights, 75 Harv. L. Rev. 1532 (1962). The collective bargaining process "lies at the core of our mature labor policy..." Trans-World Airlines, Inc. v. Hardison, supra, at 79, 53 L.Ed. 2d 113, 97 S.Ct. 2264. See, e.g., 29 U.S.C. § 151 [29 U.S.C. § 151].

Id. at 760.

It is clear that Congress intended Section 703(h) as being protective of a primary aim of collective bargaining, and it is that adherence to collective bargaining and the notion of hard won seniority rights obtained thereby, that informs the Section 703(h) protections written into Title VII in 1964.

Since 1971 all hiring in the Police and Fire Departments has been subject to a

court ordered system that includes judicial oversight of the hiring and employment process because of judicially determined racial discrimination. Hired under the constraints of this judicial oversight, these employees' expectations of job security and other employment benefits are necessarily colored by the court's ongoing duty to eradicate the discriminatory evil at which the decree was directed. Franks, 424 U.S. at 758, certainly holds that even employee expectations based on collectively bargained seniority rights may be modified to remedy unlawful discrimination. Certainly in this case where there is no collective bargaining agreement which addresses seniority; where the applicable provision is part of a statutory scheme which has been judicially determined to be discriminatory; and where all hiring for

the past eleven years and virtually all those subject to layoff were hired pursuant to the court's supervision of its remedial order, the court's power is no less.

B. Section 703(h) Does Not Limit The Scope of Remedial Orders

Even if the Court determines that the statutory preference scheme constitutes a seniority system within the meaning of Section 703(h), petitioners are incorrect in their suggestion that Teamsters and its progeny preclude the remedial relief ordered below. Such assertions misperceive the essence of this case for several reasons.

First, as the Court of Appeals observed below:

> None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be evis-

> cerated by senioriy based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Boston Chapter, NAACP, 679 F.2d at 974-75.

Second, Section 703(h), merely helps define what is and what is not a violation of the Act. Franks, 424 U.S. at 758. Thus, in every case in which this Court has ruled regarding a seniority system that is claimed to be bona fide, it was addressing the question of whether or not a violation of the Act has been established. See, Teamsters, 431 U.S. 324; California Brewers Ass'n, 444 U.S. 598; American Tobacco Co., 71 L.Ed.2d at 760. Pullman Standard v. Swint, ____ U.S. ____, 102 S. Ct. 1781 (1982). Here the issue is whether or not a remedial order, which seeks to preserve the integrity of a prior court decree, may require departures from the routine operation of an arguably bona fide

seniority system. Where the contours of remedial orders are involved, this Court has repeatedly approved alteration of seniority rules. See Franks, and Zipes v. Trans World Airlines, ____ U.S. ____, 71 L.Ed.2d 234, 247 (1982).

C. Title VII Authorizes Affirmative Remedies

The amicus briefs for the United States and the AFL-CIO argue that the remedy under Title VII is limited to providing make-whole relief. Thus, they conclude that Title VII absolutely proscribes affirmative remedies that incidentally benefit individual members of the disadvantaged class who have not proved that they were directly victimized by the employer's unlawful conduct.20/

20/ The United States does not explicitly state to this Court that its reasoning would result in absolute prohibition of affirmative measures.

However, the Court repeatedly has concluded that make whole relief is only "one of the central purposes of Title VII." Franks, 424 U.S. at 763 (emphasis added).21/

20/ continued

However, the United States has taken its argument to this conclusion in other cases. See Motion to Intervene As A Party Appellee and Suggestion of Rehearing En Banc, Williams v. The City of New Orleans, No. 82-3435, 694 F.2d 987 (5th Cir. 1982). This position is contrary to the prior consistent interpretation of Title VII by the Attorney General, the Solicitor General, the Equal Employment Opportunity Commission, the Department of Justice and other agencies of the federal government. See, e.g., Brief for Petitioners the United States and the Equal Employment Opportunity Commission, Steelworkers v. Weber No. 76-432, at 26-35; 42 Op. Att'y Gen. No. 37 (Sept. 22, 1969); Uniform Guidelines on Employee Selection Procedures , Appendix (Policy Statement on Affirmative Action), 29 C.F.R. § 1607.

21/ In Steelworkers v. Weber, 443 U.S. 193, 204 (1979), the Court concluded that affirmative measures are "effective steps to accomplish the goal that Congress designed Title VII to achieve," and that such measures "hasten the elimination of [the vestiges of past discrimination]."

The lower federal courts have concluded that a proscription on judicially-imposed affirmative remedies for proven Title VII violations "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." United States v. Intl. Bro. of Elec. Wkrs, L. No. 38, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Indeed, every federal circuit has concluded that use of affirmative remedies is not proscribed by Title VII.22/

22/ See, e.g., Boston Chapter, NAACP, Inc., 504 F.2d at 1026-28; Ass'n Against Discrimination v. City of Bridgeport, 647 F.2d 256, 279-84 (2d Cir.), cert. denied, 454 U.S. 897 (1981); Rios v. Enterprise Assn., Steamfitters Loc. 638, 501 F.2d 622, 631 (2d Cir. 1974); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978); United States v. Intern. Union of Elevator Constrs., Local 38, 538 F.2d 1012 1017-20 (3d Cir. 1975); Chisholm v. United States Postal Service, 665 F.2d 482, 498-99 (4th Cir. 1981); James v. Stockham Values &

22/ continued

Fittings Co., 559 F.2d 310, 356 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Detroit Police Officers Assn., 608 F.2d at 696; EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); vacated on other grounds, 431 U.S. 951 (1977); United States v. City of Chicago, 549 F.2d 415, 436, cert. denied, 434 U.S. 875 (1977); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Davis v. County of Los Angeles, 566 F.2d 1334, 1342-44 (9th Cir. 1977), vacated on other grounds, 440 U.S. 625 (1979); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257, 293-95 (D.C. Cir. 1982). See also cases listed at n.26, infra.

Although the new Eleventh Circuit has not itself addressed this issue, the decisions of the former Fifth Circuit are controlling in the new Eleventh Circuit. See Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).

Several of the lower court decisions imposing affirmative remedies have been cited with approval in opinions of this Court. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 353-54, n.28 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun); Fullilove v. Klutznick, 448 U.S. 448, 510-11 (1980) (opinion of Justice Powell).

Amicus the AFL-CIO relies on one sentence of Title VII -- the last sentence of Section 706(g) -- to support its assertion that Title VII proscribes a remedy which this Court has found to be "effective," Steelworkers v. Weber, 443 U.S. 193, 204 (1979), and which the federal courts of appeals unanimously have found to be necessary. As discussed below, Section 706(g), like Section 703(j) of Title VII,[23/] was intended to make clear that the Act does not require any particular racial composition of the workforce solely for the purpose of racial balance, and does not speak to the issue of affirmative remedies for Title VII violations.

The last sentence of Section 706(g) sets out a factual predicate for its

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23/ 42 U.S.C.. § 2000e-2(j).

application: that "an individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, sex, or national origin or in violation of section 704(a)." Affirmative measures do not require the hiring or promotion of an individual; rather they direct the employer to select from among qualified members of the class against whom the employer has discriminated. Thus, as the Court of Appeals for the Third Circuit has found, the last sentence of Section 706(g) was designed to preserve the employer's defense against a claim for individual relief. See EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177 (1977), cert. denied, 438 U.S. 915 (1978).

The 1964 legislative history of Title VII provides no clear indication concerning

Congress' view on affirmative action. See, e.g., Brief for Petitioners the United States and the Equal Employment Opportunity Commission, Steelworkers v. Weber, No. 76-432, at 28-31. However, the 1964 legislative history supports amicus' conclusion that the last sentence of Section 706(g) is directed toward individual remedies and that the 1964 Congress did not address the issue of affirmative relief.[24/]

24/ We have located only three explanations of the last sentence of Section 706(g). Congressman Celler explained that the sentence was to preclude the finding of "any violation of the act which is based on facts other ... than discrimination." 110 Cong. Rec. 2567 (1964) (emphasis added).

An interpretative memorandum introduced into the Congressional record by the Senate floor leaders Senators Clark and Williams also suggests that the sentence addresses violations of the Act, and not affirmative remedies. 110 Cong. Rec. 7214 (1964).

Finally Senator Humphrey explained that the "hiring, firing, or promotion of employees [will not be permitted] in order to meet a racial 'quota' or to achieve a certain racial balance." 110 cong. Rec. 6548. This statement also is consistent with the view that Section 706(g) bars

The brief for the AFL-CIO cites several "anti-quota" statements made during the 1964 debates. However, these statements were not specifically directed at Section 706(g). As a result of concerns about the imposition of quotas, Section 703(j) was added to the bill which became Title VII. See Vaas, Title VII: Legislative History, 7 B.C. Ind. & Comm. L. Rev. 431, 447-57 (1966). There is simply no basis for believing that the statements cited in the brief of the AFL-CIO refer to Section 706(g), rather than the concern addressed by Section 703(j).25/

24/ continued

affirmative remedies imposed solely for the purpose of achieving a specific racial balance, but does not prohibit such remedies where they are necessary to achieve the valid remedial purposes of Title VII.

25/ Thus, since "Section 703(j) speaks to substantive liability under Title VII and does not concern whether race can be taken into account for remedial purposes,"

Any doubts that Title VII authorized affirmative remedies were put to rest with enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which comprehensively revised Title VII. The intent of Congress when it passed the 1972 Act is particularly significant to this case, because the Act extended Title VII to state and local governments, including the City of Boston. Moreover, Congress in 1972 carefully considered the court's remedial powers and amended Section 706(g) to expand the remedial authority of the courts. Thus, with respect to the remedies that can be imposed against local govern-

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25/ continued

Weber, 443 U.S. at 204, n.5, the remarks cited by the AFL-CIO have no relevance to this case.

mental bodies, Congress' intent in 1972 is of much greater relevance than the ambiguous 1964 legislative history.

By the time Congress enacted the 1972 Act, the case law firmly established that affirmative remedies are necessary and appropriate in some situations to correct Title VII violations.[26/] These court deci-

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26/ See, e.g. United States v. United Brotherhood of Carpenters & Joiners, Local 169, 457 F.2d 210 (7d Cir.), cert. denied, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. International Bro. of Elec. Wkrs. L. No. 38, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970); Local 53, Asbestos Workers v. Volger, 407 F.2d 1047, 1055 (5th Cir. 1969).

The federal courts had also upheld the affirmative measures required of federal contractors under Executive Order 11246 against challenges that such measures were prohibited by Title VII. See, e.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972).

sions were well-known to Congress and figured predominantly in the Committee Reports and debates on the 1972 Act.[27] The House Report explicitly stated: "Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H. R. Rep. NO. 92-238, 92nd Cong., 1st Sess. 16 (1971).

Moreover, amendments were introduced in both the House and the Senate to restrict federal agencies and courts from ordering affirmative hiring remedies, and all of these amendments were defeated. See 117 Cong. Rec. 32111 (1971); 118 Cong. Rec.

27/ Both the House and Senate reports cited with approval several of the court decisions upholding affirmative remedies. See, e.g., S. Rep. No. 92-415, 92nd Cong., 1st Sess. 5 n. 1 (1971); H.R. Rep. No. 92-238, 92 Cong., 1st Sess. 8 n. 2, 13 (1971).

1676 (1972); id., at 4918.[28/] In opposing such amendments offered by Senator Ervin, Senator Javits, the co-floor leader of the bill, specifically defended the affirmative measures ordered by several federal courts, and had two of the courts' opinions printed in their entirety in the Congressional Record. 118 Cong. Rec. 1664-1676

28/ The Brief for the AFL-CIO, at 17-21 asserts that statements made in connection with the rejection of the Dent Amendment establish Congress' common understanding that such an amendment was unnecessary because Title VII already prohibited quotas. There is no doubt that Congress believed that quotas were prohibited; in fact Section 703(j) of Title VII explicitly so provides. However, this understanding provides no insight as to whether Congress thought that court-imposed affirmative remedies were proscribed quotas. For example, Representative Hawkins (quoted at Brief for AFL-CIO, at 18) explained that the Philadelphia Plan, which provided numerical hiring guidelines, did not constitute establishment of quotas. 118 Cong. Rec. 8465. See, also id. at 8520 (remarks of Representative Ford.)

(1971).[29]

Third, Congress indicated its approval of affirmative measures when it added Sections 717 and 718 to Title VII. Section 718 was proposed by Senator Ervin for the purpose of correcting inconsistency of administration of the affirmative action program under Executive Order 11246. See 118 Cong. Rec. 578-81 (1972).[30] Enactment of Section 718

29/ Congress' awareness of the decisions that had ordered affirmative measures in Title VII cases is particularly significant in view of the understanding expressed in the section-by-section analysis submitted with the conference report to both Houses of Congress that in any area not addressed by the 1972 Act "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972).

30/ Thus, contrary to the assertion in the Brief for the AFL-CIO, at 24, Congress did not reject all amendments offered by Senator Ervin in order to end the filibuster.

demonstrates that Congress carefully considered the Executive Order program, modified one aspect of that program and deliberately left intact the substance of the program, including its affirmative action requirements. Congress' approval of the affirmative measures used under the Executive Order program necessarily included the Congressional decision that such measures do not violate Title VII.

Section 717 extended Title VII to federal government employees. Section 717 requires, among other things, that each department and agency develop an affirmative action plan for employment.[31/]

31/ The Civil Service Commission "is to review, modify and approve each department or agency developed [plan] with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area." S. Rep. No. 92-415, supra, at 15.

The purpose of section 717 was to make the Federal Government a "model employer." 118 Cong. Rec. 2298 (statement of Mr. Williams). Thus requirement of affirmative measures by the Federal Government is inconsistent with the notion that Congress intended to prohibit, or thought it had already prohibited, court-imposed affirmative remedies for proven violations of Title VII.

D. The District Court's Order Is Consistent With Section 706(g)

The Brief for the United States, at 22-24, asserts that the District Court's order is contrary to Section 706(g). The position of the United States is based on its view that "make whole" relief for proven victims is the only purpose of a Title VII remedy. Because the United States' position would result in prohibition of all affirmative remedies

under Title VII, the argument of the United States must be rejected for the reasons stated in Part C, above.

Moreover, it is clear that the layoff order is consistent with Section 706(g). As discussed above, the order served important Title VII goals and the first sentence of Section 706(g) is broad enough to encompass relief which is necessary to preserve the court's original decree.

The last sentence of Section 706(g) simply does not pertain to the Court's layoff order. The order does not require the City to hire, reinstate, etc., any particular individual. Rather, the order gives the City the option of engaging in no layoffs, or utilizing any layoff program that does not interfere with the purposes of the original decree. Moreover, because the order is designed to preserve a

decree aimed at achieving goals of Title VII other than individual make-whole relief, the order is not within the purpose of the last sentence.

IV. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH THE FOURTEENTH AMENDMENT

It is beyond serious question that imposition of affirmative measures in appropriate situations to remedy Title VII violations is consistent with the equal protection guarantees of the Constitution. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 363 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun). Indeed, the standards developed by the courts of appeals in the Title VII area have been used for guidance in determining the constitutionality of other types of affirmative action. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 510-11

(1980) (opinion of Justice Powell); Bakke, 438 U.S. at 301 (opinion of Justice Powell).

"Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." Fullilove, 448 U.S. at 483 (opinion of Justice Burger). While the Court has insisted that such a remedy is appropriate only in cases of "identified discrimination", id., at 498 (opinion of Justice Powell) the Court has never suggested that the remedy is constitutionally limited to make-whole relief for identified victims. Rather, the scope of the constitutionally permitted relief is defined by what is necessary to "repai[r] the effects of discrimination," id. at 510.32/

32/ For example, the Court repeatedly has held that race-conscious numerical remedies

The District Court's order in this case is a remedial measure that is consistent with the Fourteenth Amendment. The District Court imposed its layoff order only when it became apparent that the remedy it had previously ordered would otherwise be nullified. The same compelling necessity that mandated the initial affirmative relief also mandated action to preserve that remedy.

The court's layoff order satisfies all of the requirements for constitutional

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32/ continued
are necessary to remedy unconstitutional school desegregation. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). The race-conscious remedies in these cases were not limited to "make-whole" relief for children in the school system during the years in which violations occurred. Rather, race-conscious remedies affecting future generations of schoolchildren were found necessary to overcome the effects of past discrimination and to assure future compliance with the law.

affirmative action. The order was the only way possible to preserve the original remedy, see, e.g., Fullilove, 448 U.S. at 480-89 (opinion of Justices Burger, White and Powell); id., at 498-99 (opinion of Justice Powell); Bakke, 438 U.S. at 315 (opinion of Justices Brennan, White, Marshall and Blackmun), and it did not stigmatize or single out any politically weak non-minority group to bear the brunt of the remedy. Id., at 361.[33/]

While the burdens of discriminatory conduct and its remedy may be harsher in a recessionary, financially-depressed economy, the constitutional issues and analysis

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33/ Indeed, the strong political power of the affected non-minority employees is demonstrated by the fact that the state legislature appropriated funds sufficient to prevent any layoffs when the district court determined that non-minority rather than minority employees primarily would be laid off.

must remain the same. Where such measures are necessary to achieve the remedial purposes of Title VII, the constitutional requirements for their imposition are satisfied.

CONCLUSION

We have focused on an aspect of the issues in this case as they impact on factors that affect the well being of our Nation's cities. We believe that it is of some significance that no City, not even the City of Boston which is the immediate city involved, has sought to support the position espoused by petitioners. In this case the discretion exercised by Chief Judge Cafferty served as a spur to release the creative energies that produced a solution which served well the interests of the citizens of the City of Boston. It appears that, so long as the last-hired

first-fired system of layoffs was followed, resulting in placement of the entire burden on the shoulders of politically-weak minorities, there was little incentive for the diverse actors to devise alternatives that would not undo the progress made pursuant to the district court's earlier orders. If this Court were to approve the arguments being advanced by petitioners, the ability of financially strapped cities to find alternatives to destructive layoffs would be undermined. The decision of the United States Court of Appeals for the First Circuit should be affirmed.

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In Baker v. City of Detroit, 483 F. Supp. 930, 996 (E.D. Mich. 1979) a district court described fully the causes and public safety consequences of the Detroit Police Department's discriminatory conduct as follows:

> [T]he Police Department and the black community were at each other's throats at least until the early 1970's. ... the Police Department was regarded as an "occupation army" in the black community and was treated as such. Precinct stations in the black community looked like armed fortresses; they were shot at by passing cars of black youths. Officers were afraid to venture into the community for fear of being harassed or worse.
>
> This sad state of affairs had many causes. The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe. Some of the testimony of Mr. Arthur Johnson before the Civil Rights Commission in 1960, previously quoted in this opinion, vividly

portrays the attitudes and practices of the Department -- practices that Mr. Johnson testified were such that there wasn't a black citizen in the City of Detroit who had not been subject to them.

Witness after witness at trial testified that discriminatory police practices were common. Inspector Harold Johnson testified that officers would often stop black motorist for traffic offenses, search the car, take the seat of the car out, and then leave the seats on the street when they were finished. Deputy Chief Police Reginald Turner, who commanded the tactical mobile unit starting in 1974, corroborated this testimony. He noted that disproportionately large numbers of black citizens were injured as a result of traffic stops. Chief Hart testified that "[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; its a matter of record." Deputy Chief Bannon testified that informal police rules in the forties and fifties were that "all blacks west of Woodward Avenue after sundown would be investigated unless they were known to the police officer." This "pattern of systematic discrimination" continued against blacks in individual officer-on-citizen contacts.

Empirical proof of ongoing crisis in relations between the Department and the black community is the

fact that Detroit suffered major riots in 1943 and 1967 which required federal troops to subdue the violence. This Court has already discussed these riots and the major role that police-black community friction played in triggering each of them. This Court has also discussed the so-called "Kercheval incident" of 1966. In subsequent years the City underwent unrest triggered, in 1968, by the assassination of Martin Luther King, Jr., and, in the following years, by a special tactical police squad known as STRESS.

Vivid testimony was presented at trial regarding the New Bethel Church incident of 1969 by eyewitness police inspector Mack Douglas. Following reports that a white policeman had been shot near the New Bethel Church, twenty or thirty policemen converged on the building. The people inside the church were black and included women and children. The police went on an unprovoked rampage and began shooting and looting. The people in the church ducked for cover as best they could. The shooting was stopped by two black officers who physically removed the guns from the hands of the white officers. This incident is an extreme example of police practices which outraged the black community.

The Department paid a heavy price for its discriminatory practices. The defendants have accurately

characterized what resulted a a "cycle of violence" as the Department and the black community warred on each other. Six to eight police officers a year would die in the line of duty; no officer felt safe in the black community. The burden of the discriminatory police practices, however, was ultimately borne by the black and white citizens of Detroit.

The black community's response to department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty. Many times, crowds developed when the police arrived at the scene of a crime. These crowds were often hostile to the police and interfered with them. White officers who had

> responded to a radio run often had to get assistance for themselves. The police themselves--and ultimately the citizens of Detroit--were the real victims of discriminatory practices. (footnotes omitted).

483 F. Supp. 996-97.

In Baker the district court described the effects of Detroit's affirmative action efforts on police-community relations as follows:

> The empirical proof that racial classifications were needed is the testimony of witness after witness as to the results of affirmative action hiring and promotions. Chief Hart in particular noted the harmony which has gradually developed between the Department and the community. He testified that as a result of the affirmative action program, there was a significant decrease in discriminatory police practices and a concomitant increase in good feelings toward the Department. The affirmative action program gave the Department the credibility in the black community which had been absent previously. The Department had historically been all but off-limits to blacks. Now the community saw increasing numbers of their friends and neighbors in the Department, and at all levels.

The good feeling which developed was evident in many ways. A survey by Market Opinion Research found that while white attitudes toward the Department had stabilized, there was a "dramatic increase" in the number of blacks rating the relationship between the police and the community as "good." 22% of black citizens surveyed so characterized the relationship in 1973; 43% did so in 1978. Chief Hart testified that the "occupation army" mentality melted away as did problems of hostile crowds and sullen, incooperative citizens.

Chief Hart and Deputy Chief Bannon directly linked the dramatic improvement in police-community relations to the affirmative action plan and its objective of having a police force reasonably representative of the community it policed. Former Police Commissioner Patrick Murphy testified that where white officers did not share the cultural values and backgrounds of black citizens, courses in black culture or sensitivity training in race relations for white officers did not work. In Commissioner Murphy's eyes, all the training in the world could not "substitute for the understanding, the deep perceptions of people who have come from the minority background and culture." The fact that other Departmental efforts to improve police-community relations were, in the words of Deputy Chief Bannon, "absolutely ineffective," demonstrates

the truth in Commissioner Murphy's words, and confirm the need for more black officers at all ranks.

The testimony at trial additionally linked the affirmative action plan to less citizen complaints, less shootings of police officers, and ultimately a lowered crime rate. Chief Hart and Deputy Chief Bannon testified that the affirmative action plan dramatically reduced citizens' complaints filed against the Department. Chief Hart testified that the plan resulted in a reduction of the number of officers killed in the line of duty of from 6 to 8 each year to zero. Chief Hart testified at trial that no police officer has been killed in the line of duty since 1974, when the affirmative action plan was instituted. Chief Hart also testified that crime was reduced significantly because of police-citizen cooperation fostered by the affirmative action program. Former Chief Tannian corroborated these views:

> "After we put substantial numbers of minorities in a supervisory capacity on the street, I found that the number of complaints from a racial standpoint went down, the level of cooperation in terms of information that witnesses at the scene just gratuitously offered improved, and the most significant example of

> fact that I can point to is the homicide area. When I took over the Police Department the homicide solution rate was between 50 and 60 percent and when I left the Police Department it was between 70 and 80 percent, and I am claiming that that is a direct result of citizen cooperation.

483 F. Supp. at 999-1000.

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Case No. 82-185

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

vs.

BOSTON CHAPTER, NAACP, ET AL.,
Respondent.

AMICUS BRIEF OF DETROIT POLICE OFFICERS ASSOCIATION FILED IN SUPPORT OF PETITIONERS' BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

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I. STATEMENT OF INTEREST

The Detroit Police Officers Association is the recognized bargaining agent for approximately 2,500 police officers of the City of Detroit, Michigan. The DPOA files this Amicus Brief to state its position on legal and constitutional issues of growing significance. DPOA contends that both Title VII and the Constitution prohibit layoff procedures, whether or not by order of a Federal Court, which circumvent lawfully adopted state seniority systems and target individual employees for termination based upon race, rather than seniority.

This Court must now resolve these issues in the context of the Boston Police and Fire Departments. The problems of

reductions in force, particularly in safety services, have become increasingly prevelant throughout the United States, particularly in those regions of the northeast and midwest hardest hit by unemployment, thinning populations, and a resulting drop in state and local revenues. These factors, along with reduced federal assistance to cities, have forced dozens of municipal governments to cut back public services in order to live within their means. Those service cuts often mean reductions in force, particularly in the personnel-intense area of safety services. As in Massachusetts, state laws in Michigan, Ohio and other states have traditionally protected veteran police and fire personnel through seniority systems built up on the "last hired, first fired" principle.

The decision of the Supreme Court in these consolidated cases may determine the fate of bona fide seniority systems for public employees throughout this nation. DPOA believes that the concept of seniority was protected by the Congress in the enactment of Title VII, and that any court order requiring an employee to forfeit vested rights gained under a bona fide seniority system because of his race violates the Fourteenth Amendment of the United States Constitution.

The particular distinction between the facts of these cases and other cases allowing "race conscious" remedies is that the "victims" of the remedy are readily identifiable individuals who, along with their families, will be subject to the economic burdens and social stigma of layoffs only because of their race.

In times of more than 10% unemployment, the burden of a layoff from a highly skilled and specialized job, such as firefighter or police officer, is particularly accute. It is a burden that is borne by the laid off public servant as well as his family. But when that burden is imposed not because of the employee's relative qualifications or seniority, but simply because of his race, the stigma becomes unreasonably burdensome and clearly violates constitutional standards set forth by Justice Powell in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) and a majority of this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

A remedy which sets aside a lawfully adopted state seniority system simply to achieve (or preserve) racial balance also exceeds the scope of a federal court's authority under Title VII of the 1964 Civil Rights Act.

II. SUMMARY OF ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

In his opinion in *Bakke*, Justice Powell articulated a standard of strict judicial scrutiny for "race conscious" remedies that prefer one race over another, based upon the equal protection clause of the Fourteenth Amendment. That standard of strict scrutiny was adopted by a majority of the Court in *Fullilove*.

The Fourteenth Amendment prohibits a judicial remedy requiring racial balance in public employee layoffs in place of a "last hired, first fired" seniority layoff system implemented under State law. Such a remedy may not survive strict judicial scrutiny where the identifiable and innocent "majority" employees are the subjects of a racial classification which causes them to lose their jobs. The abstract goal of preserving a racial balance is not a satisfactorily compelling government interest to justify such a racial classification under the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A JUDICIAL REMEDY THAT UNNECESSARILY TRAMMELS THE INTERESTS OF INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Congress specifically exempted *bona fide* seniority systems from challenge when it adopted Title VII. 42 U.S.C. § 2000e-2(h). Congress's intent in adopting Title VII was to provide equal *opportunity*, not to require racial balance. 42 U.S.C. § 2000e-2(j).

A judicial remedy adopted under Title VII which causes innocent employees to lose seniority rights, and their jobs, because of their race, in order to achieve or preserve a racial balance, exceeds the remedial powers allowed by Congress for the enforcement of Title VII.

III. ARGUMENT

1. THE CONSTITUTION PROHIBITS THE JUDICIAL IMPOSITION OF RACIAL LAYOFF QUOTAS IN PLACE OF A BONA FIDE PUBLIC EMPLOYEE SENIORITY SYSTEM.

The scope of a judicial remedy is limited by both the violation shown by the Plaintiffs, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), as well as the constitutional limits upon governmental power applicable to all branches of government.

As a matter of law, this Court may not find that the types of "last hired, first fired" seniority systems used throughout this nation by state or local government, either under state law or through collective bargaining agreements, is a tool of racial discrimination subject to judicial relief.

In these cases the remedy allowed is particularly inappropriate since (1) the white employees laid off out of seniority order, because of their race, were not shown to be participants in any scheme of racial discrimination, but are simply innocent victims of racial preference; and (2) the minority employees given preference from layoffs, despite lower seniority rights, have not been shown to be "victims" of past and specific acts of discrimination. In these cases, the Court of Appeals improperly acted to preserve a racial balance rather than to remedy specific acts of discrimination.

A. The Constitutional Standards for Race Conscious Remedies Have Been Set By Bakke and Fullilove.

Constitutional analysis used by a majority of this Court in a series of cases would suggest that the Fifth and Fourteenth Amendments do not allow the forfeiture of bona fide seniority rights simply to preserve a recial balance.

In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), this Court set aside a racial preference program for admissions to a state medical school. The key to the Court's decision appeared to be the ability of Bakke to show that the burden of the racial preference fell upon identifiable "majority" applicants, who were denied admission only because of their race.

As with the remedy approved by the Court of Appeals in this case, the racial preference adopted by the University of California was not designed to provide a remedy to specific victims of past discrimination, but rather was intended to encourage racial balance in order to satisfy more general social goals. Justice Powell, in his lead opinion, found that Title VI of the 1964 Civil Rights Act "must be held to prescribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 at 287. He then examined the historical development of Fourteenth Amendment's applicability to claims of racial or ethnic discrimination:

> "As the nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishman) (dictum); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, *supra*, (Japanese); *Hernandes* v. *Texas*, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the court in *Yick Wo*, are 'universal in their application, to all persons within the territorial jur-

> isdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. 118 U.S. at 369."
>
> 438 U.S. at 292-93

In analyzing and rejecting the notion that racial classification, if "benign", may be made on behalf of a traditional racial minority, Justice Powell noted that:

> "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which group would merit 'heightened judicial solicitude' and which would not."
>
> 438 U.S. at 295-296.

Of particular significance to the claims of Petitioners in this case was Justice Powell's focus upon the improper burden that "benign" racial classifications may have upon individual and innocent victims of such classifications:

> "[T]here is a measure of inequity in forcing innocent persons in Respondent's position to bear the burdens of redressing grievances not of their making."
>
> 438 at 298.

In the case of laid off but more senior "majority" public employees, the burden is clear and swift – the loss not only of seniority opportunities but of a *job*.

In rejecting the specific racial quota adopted in *Bakke*, Justice Powell distinguished a series of cases which have allowed courts to formulate "race conscious" remedies for proven constitutional violations. In those cases the following elements were shown:

(1) In school desegregation cases, such remedies were allowed because "[e]ach involved remedies for clearly determined constitutional violations. E.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)."; and

(2) "[T]he scope of the remedies was not permitted to exceed the extent of the violations. E.g., *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)."; and

(3) In certain employment discrimination cases, race-conscious remedies were allowed, such as the award of retroactive seniority only to *"the victims of discrimination* – not just by society at large, but by the respondent in that case."; and

(4) Only where such an award was necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " citing *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976).

438 U.S. at 301-02.

In concluding that the *Bakke* quota violated the Fourteenth Amendment, Justice Powell applied strict judicial scrutiny to an inherently suspect racial classification stating that:

"Prefering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

438 U.S. at 307.

In the context of the "strict scrutiny" of an inherently suspect racial classification, the classification may be supported only by a "compelling" government interest. As stated in *In re Griffiths*, 413 U.S. 717, 721-722 (1973), the suspect classification may be justified only when a government agency

"show[s] that its purpose or interest is both constitutionally permissible and substantial, and that its use of

> the classification is 'necessary . . . to the accomplishment of its purpose or the safeguarding of its interest."

Justice Powell in *Bakke* noted that the Court had allowed racial classifications "at the expense of other innocent individuals" only upon "judicial, legislative, or administrative findings of constitutional or statutory violations." 538 U.S. at 307. Then the racial classification is allowable as a remedy because "the legal rights of the victims must be vindicated". 438 U.S. at 307. Even under those circumstances, "the remedial action usually remains subject to continuing oversight to *assure that it will work the least harm possible to other innocent persons competing for the benefit.*" 438 at 307. (Emphasis added.)

These constitutional limits upon race conscious remedies appear to have been adopted by a majority of this Court. In *Bakke*, the Chief Justice, along with Justices Stevens, Stewart, and Rehnquist, concluded that the University's Special Admissions Program violated Title VI of the Civil Rights Act of 1964 because of its racial exclusion of *Bakke*. Their opinion, written by Justice Stevens, specifically avoided reaching the constitutional issues.

In *Fullilove* v. *Krutznick*, 448 U.S. 448 (1980), the full court for the first time examined the *constitutionality* of a racial preference program (the minority set aside program adopted under the Public Works Employment Act of 1977, which required that 10% of that program's funds be expended through minority business enterprises). While the court held that the Act did not violate the Equal Protection concepts inherent in the Fifth Amendment, a majority of the court appears to adopt the "strict scrutiny" standard of Justice Powell in *Bakke* for the review of programs involving racial preference.

Chief Justice Berger, in an opinion joined by Justices White and Powell, noted that a program that employs racial or ethnic criteria, even in a remedial context, calls for a "most searching examination to make sure that it does not conflict

with constitutional guarantees". 448 at 491. In his separate opinion Justice Powell repeated the view he expressed in *Bakke* that strict scrutiny should be applied. Justice Powell perceived the Chief Justice's opinion as "substantially in accord" with his own views. 448 U.S. at 496.

The opinion of the Chief Justice, joined in by Justices White and Powell, as well as the separate opinion of Justice Powell suggest that the minority set aside program was permissible only because of its limited impact upon "non-minority" contractors. The Chief Justice held that the act was neither under-inclusive or over-inclusive, 448 U.S. at 485-90, and satisfied the standard of a narrowly tailored remedy designed to correct specific past discrimination identified by Congress. The Chief Justice specifically noted that the program was not constitutionally defective since the actual burden shouldered by the non-minority firms was relatively light, amounting to less than 2.5% of annual construction spending. 448 U.S. at 484.

Three other Justices dissented, applying an even stricter constitutional review. Justice Stewart, joined by Justice Rehnquist argued that *all* racial classifications are suspect in that the Equal Protection Laws prohibit *any* statutory classification based on race. 448 U.S. at 523-27. Justice Stevens found that the statute was unconstitutional because it could not be fairly characterized as a "narrowly tailored" racial classification designed to remedy a specifically demonstrated violation. 448 U.S. at 553. He argued that racial classifications are "simply too pernicious to permit any but the exact connection between justification and classification." 448 U.S. at 537.

An examination of *Bakke* and *Fullilove* would indicate that a majority of the Court has endorsed strict judicial scrutiny of racial preference remedies. *Fullilove* represents statements by at least six Justices rejecting race conscious "remedies" which cannot survive genuine strict judicial scrutiny.

B. The District Court's Remedy Fails the Test of Strict Judicial Scrutiny.

The analysis adopted by the First Circuit in this case simply fails to relate the extreme remedy of gutting a state's bona fide seniority system to any compelling government interest of remedying proven constitutional violations.

1. The actions which led to the newly modified consent decrees were commenced more than ten years ago. While those actions resulted in findings of disparate impact and statutory violations at the entry level, they did not result in findings of constitutional violations based upon proof of intentional discrimination by the City of Boston. In fact, the First Circuit specifically found that "intentional discrimination was not proved". 679 F.2d at 971.

2. The violations shown related to entry level discrimination. The remedy allowed after the initial trial and appeal did not include an award of retroactive seniority, as might have been allowed if individual victims of past discrimination had been able to show that such an award was required to remedy past discrimination. See *Franks* v. *Bowman*, *supra*. As a result, respondents cannot argue that the violations shown almost ten years ago at trial required an abrogation of seniority rights in 1981 to provide proper remedy to the plaintiffs.

3. The First Circuit has specifically found that "the relief sought originally was not for individuals, but to correct a condition of racial imbalance." 679 F.2d at 976. Yet the goal of correcting "racial imbalance" clearly falls beyond the permissible scope of racial classification described by Justice Powell in *Bakke*, 438 U.S. at 307, and by six justices in *Fullilove*.

4. Finally, the First Circuit has stated that "the proper test is one of reasonableness".[1] 679 F.2d at 977. Yet this appears to follow, at the very most, only the dissenting positions in

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[1] It also must be noted that the First Circuit seriously misinterpreted *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981); which it heavily relied

Bakke. The majority has clearly adopted the test of "strict scrutiny" which requires a finding not that the remedy imposed is "reasonable" but that it serves some compelling government interest.

5. The only specific reason for the abrogation of seniority rights articulated by the First Circuit was not the remedy of *specific* discrimination in the formulation of that system, but rather a more amorphous goal of "'effective crime prevention and solution'" which depends on "the public's support and cooperation which result only from public respect and confidence in the police". 679 F.2d at 977, quoting *Detroit*

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upon and at one point referred to as "the only circuit case directly on point" with regards to the constitutionality of the District Court's orders. In *Brown*, the Sixth Circuit affirmed a lower court decision enjoining the City of Toledo from laying off its firefighters on the basis of seniority. Toledo had entered into a consent decree requiring the implementation of an affirmative action plan with a five-year timetable and percentage goals. Layoff threatened to retard the progress which the City had made after seven years. The District Court enjoined the City from implementing a layoff plan that would have decreased minority representation. The Court of Appeals affirmed. Although Judge Brown wrote the majority opinion, the West Federal Reporter misleadingly describes his opinion as a concurring opinion and suggests that Judge Keith's opinion is the opinion of the court. As indicated in the Slip Opinion, Judge Keith delivered the Court's *judgment* and an opinion. *Brown* v. *Neeb*, Nos. 80-3468, 80-3476, Slip Op. at 1 (6th Cir. March 3, 1981). In his opinion, Judge Keith argued that the lower court's injunction compelled representational layoffs. 644 F.2d at 563-64. The Slip Opinion also noted that Judge Brown delivered a separate opinion in which Judge Wiseman, the third Judge on the panel, joined. Slip Op. at 1. Judge Brown disassociated himself from Keith's views regarding representational layoffs, noting that such layoffs would violate the collective bargaining agreement and Ohio law. 644 F.2d at 565-66. Thus, a majority of the Court affirmed the lower court's injunction and forced the parties to consider layoff's alternatives other than representational layoffs. Note, Alternatives to Seniority Based Layoffs, Reconciling *Teamsters*, *Weber* and the Goal of Equal Employment Opportunity, 15 U. Mich. J.L. Ref. — (1982).

Police Officer's Association v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979). Yet the court cites no substantive evidence linking these admirable goals to the necessity of laying off non-minority police officers out of the normal order of seniority. Justice Powell found that, to support a racial classification "a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." 438 U.S. at 309, citing *Califano* v. *Webster*, 430 U.S. at 316-321. The record does not contain adequate proof linking effective crime prevention to the specific remedy of a racial classification in layoffs.

The Equal Protection Clause commands *the elimination* of racial barriers, not the creation of barriers to satisfy someone's theory as to how society ought to be organized. *DeFunis* v. *Odegarrd*, 416 U.S. 312 (1974) (Douglas dissenting). The District Court's use of racial preference to set aside a lawfully adopted and racially neutral seniority system adopted by the State of Massachusetts violates "the Equal Protection component of the Due Process Clause of the Fifth Amendment". *Fullilove* v. *Klutznick*, 448 U.S. at 473. To the extent that the layoffs were implemented by local government authorities, whether or not under order of the District Court, the use of the racial preference violated the Equal Protection Clause of the Fourteenth Amendment.

2. TITLE VII DOES NOT SUPPORT A REMEDY WHICH UNNECESSARILY TRAMMELS THE INTERESTS OF INNOCENT EMPLOYEES BECAUSE OF THEIR RACE.

Both Congress and this Court have clearly restricted the ability of the courts or employers to set aside bond fide seniority systems for the sake of preserving racial balance. Both the Congress and this Court have been guided by principles of fairness which must protect innocent employees from job loss on account of their race.

The District Court in these cases has based its modified

consent decree, at least in part, upon its power to remedy employment discrimination under Title VII. Yet Congress has placed limits on Title VII which should prohibit the unnecessary denial of a bona fide seniority rights to innocent employees because of their race.

Section 703(j) of Title VII provides that Title VII does not require an employer "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community, state, section, or other country." 42 U.S.C. § 2000e-2(i).

In this case, the First Circuit dwelt not upon the specific need to remedy individual victims of past employment discrimination, but rather upon the apparent desire of the Court to reffect on the police force the racial composition of the community. The concern of the First Circuit apparently was that "the public safety department of a city reffect its growing minority population", 679 F.2d at 977, rather than that specific victims of past discrimination be made whole.

Section 703(a) of the Act (42 U.S.C. § 2000e-2(h)) also indicates congressional intent to protect the function of bona fide seniority systems:

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system. . ."

Neither the District Court nor the Court of Appeals found that Massachusetts' "last hired, first fired" layoff system was anything less than bona fide.

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this

Court found that Section 703(h) protects bona fide seniority systems, even if they unintentionally perpetuate pre-Act discrimination.[2] In *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), the Court allowed a remedy which awarded certain retroactive seniority rights to *identified victims* of past discrimination. Yet even in that case Justice Powell recognized the danger of tampering with a bona fide seniority system when the rights of innocent parties are placed in jeopardy:

> "[C]ompetitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged – sometimes to the extent of losing their jobs entirely – are not the wrongdoers who have no claim to the chancellor's conscience, but rather are innocent third parties."
>
> 424 U.S. at 788-89 (Opinion by Powell, J., concurring in part and dissenting in part).

The First Circuit attempted to discount the rights and expectancies of white employees "who have been innocent themselves of any discrimination [but] will lose their jobs, at least temporarily." 679 F.2d at 977. The First Circuit stated that "white as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities." 679 F.2d at 977.

Justice Powell specifically rejected this logic in his opinion in *Franks*:

> "Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result in past discrimination against others. Such rea-

---

[2] Title VII was applied to public employers in 1972. 42 U.S.C. § 2000e(a)(f).

soning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance."

424 U.S. at 788-89, n.7. (Citations omitted).

In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court upheld a racial quota voluntarily negotiated between a *private* employer and a labor union, which set aside certain slots in a job training program for minority employees. In Justice Brennan's opinion for the majority, he noted that a key factor in winning the Court's approval was that "the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." 443 U.S. at 208.

In this case the First Circuit admitted that after the city's layoffs were imposed in order of seniority, the District Court ordered the discharge of certain white employees and their replacement by previously laid off minority employees. 679 F.2d at 977, n.14. As such, the District Court's order unnecessarily trammeled the rights of the more senior white employees, resulting in their discharge. Certainly *Weber* does not support plaintiffs' claim that Title VII permits this extreme remedy.

This Court has never ruled on the permissibility of racial quotas imposed on or by public employers with regard to promotional or other seniority rights. Yet several circuit courts have restricted such quotas, where not shown as necessary to remedy specific victims of past promotional discrimination. In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. den.*, 421 U.S. 991 (1975), black patrolmen sought to restrain the City's

discriminatory employment practices. The district court imposed hiring and promotional quotas. The Second Circuit, in reversing the promotional quota, noted the effect on innocent white employees:

> "[T]he imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes. . . . We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted."
>
> 482 F.2d at 1341. (Citations omitted).

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. den.*, 429 U.S. 823 (1976), the Second Circuit again refused to affirm a promotional quota which denied promotions to law enforcement officers solely because of their race:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. The quota placed upon a small number of readily identifiable candidates for a promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in the competitive examination, some of them may be bypassed for advancement solely because they are white." 520 F.2d at 429.

When a promotional quota is applied to public employee layoffs, the employees' job, not simply his promotion, is at stake. Certainly the considerations outlined by the Second Circuit in *Bridgeport Guardians, Inc.* and *Kirkland* are even more significant when seen in the context of layoffs. *See also White* v. *Carolina Paper Board Corporation*, 564 F.2d 1073 (4th Cir. 1977).

The Court's opinion in *Ford Motor Company* v. *EEOC*,

102 S. Ct. 3057 (1982), appears to focus upon the same rights which Petitioners in this case assert: the rights of innocent employees who may be victimized by race conscious remedies. In *Ford* the court rejected a rule adopted by the district court which prohibited the tolling of accrued back pay when an employer charged with violating Title VII unconditionally offered a claimant the job previously denied. The question was whether or not an employer was required to offer the claimant seniority retroactive to the date of the alleged discrimination, despite a previous and unaccepted offer of employment. In her opinion for the Court, Judge O'Connor stated that the rejected rule

> "threatens the interests of other, innocent employees by disrupting the established seniority heirarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority."
>
> 102 S. Ct. at 3070.

Congress did not intend by the adoption of Title VII to disrupt bona fide seniority systems, including layoff procedures implemented in order of seniority. Nor did Congress intend to allow racial preferences in layoffs in order to achieve or preserve a racial balance, particularly where the preferred employees have not been shown to be the victims of specific acts of discrimination. This Court must set aside judicial remedies adopted under Title VII which exceed Congress' clear intent in adopting that statute.

IV. CONCLUSION

Public employee layoffs never seem to occur without difficult public debate, particularly when police and fire personnel and the services they provide are cut. Our cities need not be burdened by a second and rankerous level of public debate on the issue of racial preference and quotas.

The "last hired, first fired" concept is based upon long experience and tradition, and has been implemented through

racially neutral laws adopted by the states and their local governments. It provides an orderly and sensible method of dealing with difficult community and political problems.

Judicial tampering with seniority order layoffs in the name of racial balance creates division and disorder. It separates public employees by race. It can destroy the morale of public employees and the confidence of the public. More significantly – race discrimination in the context of layoffs victimizes and stigmatizes innocent and dedicated public employees solely because of their race. This burden placed on the victims of racial balance is wholly contrary to the traditions of equal treatment and opportunity embodied in our Constitution and expressed by Congress in Title VII.

This Court must announce a firm standard which is consistent with the plain language of the Fourteenth Amendment and with Title VII, and which clearly indicates that the goal of racial balance does not justify the type of racial discrimination against innocent and identifiable individuals which is expressly prohibited by our Constitution and Title VII.

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Supreme Court of the United States

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council, with written consent of all parties, respectfully submits this brief amicus curiae in support of the petitioners. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and to various other federal statutes, orders and regulations pertaining to nondiscriminatory employment practices.

This employment discrimination case, initially brought under Sections 1981 and 1983, involves the involuntary modification of racially-based, hiring-specific consent decrees. The First Circuit's decision approves the imposition of a racially-based layoff scheme which overrides the operation of a state statute incorporating a bona fide, "last-hired, first-fired" seniority system over the objection of the state employer. Accordingly, this case raises several issues of vital interest and concern to EEAC members: the nature of proof required to establish a violation of Section 1981; the limits of a district court's

equitable power to modify EEO consent decrees; and the legal protections afforded seniority systems.[1]

EEAC is particularly concerned about the seniority issues raised herein. Seniority systems are prevalent not only within numerous state public employment schemes,[2] but throughout American industry as well.[3] EEAC's members, as major employers of the nation's work force, have a substantial interest in helping to reinforce and ensure the validity of these seniority systems. Accordingly, because of its interest in issues involving the interpretation of Section 703(h) of Title VII, which immunizes from Title VII liability neutral, bona fide seniority systems, EEAC has filed briefs as amicus curiae with this Court in *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982); *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982); *California Brewers Assn. v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines*

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[1] The Commonwealth of Massachusetts in this case has also raised issues which implicate the Tenth Amendment to the Constitution, as construed by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). These issues, which involve the delegation of government powers within the federal system, are not addressed by the Amicus, EEAC.

[2] A schedule of citations to the seniority statutes in twenty-four jurisdictions appears on page A47 of the Petition for a Writ of Certiorari of the Boston Firefighters Union Local 718.

[3] Since passage of the Wagner Act in 1935, seniority provisions, including layoff policies, have been a mandatory subject of collective bargaining. 29 U.S.C. § 151 (1973), construed in *United States Gypsum Co.*, 94 N.L.R.B. 112, 113 (1951); *Hilton Mobile Homes*, 155 N.L.R.B. 873 (1965). Based on a 400-contract, representative sample culled from a file of more than 5,000 collective bargaining agreements currently in force, the Bureau of National Affairs reports that layoff provisions are included in 88 percent of such contracts. Seniority is the sole consideration or determining factor in 72 percent of these agreements. 2 Coll. Barg. Neg. & Cont. at 60:1 (BNA 1979).

v. Evans, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

The potential impact of this case on EEAC members and their seniority systems is made particularly manifest by the First Circuit's treatment of private sector case law. Although this case emanates from the public sector, the court of appeals devoted a considerable portion of its opinion to construing significant private sector seniority cases, including *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the *Teamsters* and *Patterson* decisions, and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980). See Pet. for Cert. No. 82-185 at A16-A28. EEAC is concerned that unless the First Circuit's decision is reversed, this Court's decisions insulating from legal challenge bona fide seniority systems in the private sector may be compromised.[4]

EEAC's interest in this case also stems from the fact that an involuntary modification of an EEOC consent decree is involved. It is not uncommon for EEAC members and other employers, like the public employer in this case, to enter into consent decrees. Because the original consent decrees in this case did not include seniority adjustments for the benefit of identifiable discriminatees, they cannot properly be modified now to override neutral, bona fide seniority systems without the acquiescence of the employer.

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[4] The Court's decision in this case is likely to issue at a critical period nationwide in private sector labor-management relations. The Secretary of Commerce has indicated that current high (double-digit) unemployment figures will not begin to decline in a "marked way" until the early Spring of 1983. 111 Lab. Rel. Rep. 115 (BNA Oct. 11, 1982). Meanwhile, 1983 will be a significant year in collective bargaining, as basic agreements come up for negotiation in the telephone, steel, aerospace, aluminum, longshore, glass, lumber, and tobacco industries. *Id.* at 112. Thus, the importance at this time of reaffirming the absolute legitimacy of seniority systems implemented without discriminatory intent cannot be overemphasized.

STATEMENT OF THE CASE

The case has its genesis in two employment discrimination lawsuits brought approximately ten years ago against the Boston Police and Fire Departments. The "police" case was brought in 1970 by unsuccessful black and hispanic candidates for appointment as police officers. They alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with the Police Department's recruitment and certification practices. Upon court findings that minorities were underrepresented in the police force (2.3%) vis-a-vis the city population (approximately 20%) and that the Police Entrance Examinations were not job related and were discriminatory, the First Circuit Court of Appeals in 1972 directed that a remedial order be entered to provide for preferential minority hiring. The district court and First Circuit both stressed the *absence* of intentional discrimination and premised their findings on the adverse impact of the departmental practices. Public officials entered into a comprehensive consent decree in 1973 to provide for priority pools of black and hispanic applicants. Supplemental consent decrees were approved by the district court in 1975, 1976 and 1979. By July, 1981, minority representation had risen to 11.7%.

The "fire" case was brought in 1972 by unsuccessful black and hispanic candidates for appointment as firefighters. The case followed the same pattern as the police case, except that in 1973 (shortly after Title VII was amended to cover public employees) the Attorney General of the United States also brought an action that included Title VII claims. Findings of discrimination based on minority underrepresentation (0.9%) and the non-job relatedness of the entrance examinations again resulted in a consent decree, subsequently amended several times, requiring preferential minority hiring. By July, 1981, minority representation had risen to 14.7%. For purposes of this appeal, there is no dispute that the

police and fire departments took the steps required to comply with the measures in the decree designed to remedy recruitment and hiring discrimination.

Neither the police nor the fire consent decrees addressed lay-off procedures. In 1981, however, the City of Boston was compelled to undertake a force-reduction program. Both the police and fire departments planned to make layoffs pursuant to the Massachusetts civil service statute, which requires separations from service in reverse order of seniority. Such a layoff program would result in a substantial reduction in the number of recently-hired black and hispanic officers on both forces. The Boston Chapter of the NAACP thereupon filed a motion to modify prior remedial orders to bar operation of the "last-hired, first-fired" layoff scheme.

The district court consolidated the police and fire cases. The court noted that Boston's minority population had grown to 30%, and, in an order covering both departments, enjoined them from reducing "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the RIF program (11.7% and 14.7%, respectively). The net effect of the order was to preserve minority representation by overriding the Massachusetts seniority statute, and to lay off incumbent white employees with greater seniority.

In affirming the district court order, the First Circuit Court of Appeals concluded: (1) that the district court had the power to revise the consent decrees because the layoffs presented unforeseen circumstances which, left to the operation of the civil service statute, would undo almost all that had been accomplished by the original decrees; (2) that the district court's order properly overrides the Massachusetts seniority statute, because the consent decrees encompass "remedies to right the wrong of past discrimination," and thus "may suspend valid

state laws;" and (3) that the district court's order is not unconstitutional because of its impact upon nonminority employees, since "[t]he fact of past discrimination agreed to in both cases constitutes a 'compelling need' for a minority-conscious remedy." But the First Circuit's opinion also noted again that the discrimination being remedied was nonintentional. It also recognized that the case did *not* involve an award of seniority preferences to identifiable victims of discrimination. Indeed, the court stressed that the initial suit had not been brought to benefit individual victims but rather to cure a condition of racial imbalance resulting from hiring discrimination.

From this opinion and judgment, the Commonwealth of Massachusetts, the Boston Firefighters Union and the Boston Police Patrolmen's Association filed petitions for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

The First Circuit improperly ruled that findings of unintentional discrimination under Section 1981 are sufficient to justify court imposition of a layoff scheme that overrides a neutral, bona fide seniority system, in favor of junior, identifiable employees. Its ruling runs directly contrary to this Court's decisions requiring proof of intent to discriminate to establish Section 1981 violations, as well as this Court's rulings effectuating Congress' intent to insulate from legal challenge the operation of neutral, bona fide seniority systems.

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court concluded that intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendment. A recent ruling of this Court similarly puts to rest any doubt that findings of intentional discrimination are necessary to prove a violation of 42 U.S.C. § 1981. *General Building Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1982). Consequently, because the First Circuit's earlier opinion in

this case lacked findings of intentional discrimination and was based only upon the adverse impact of the department's recruitment and hiring practices, it was singled out and specifically discredited by this Court in *Washington v. Davis*. See 426 U.S. at 244 n.12, *citing, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

Inexplicably, the First Circuit ignored this Court's specific disapproval of its earlier opinion and the importance of that disapproval in limiting the court's remedial authority. Instead, the court of appeals concluded that because the district court was seeking to effectuate the intent of its original remedial order, the effect of this Court's ruling in *Washington v. Davis* need not be resolved. The First Circuit thus elevated the inherent equitable power of a district court to modify consent decrees to a point beyond the reach of this Court's superseding decisional law.

To be sure, the equitable powers of the federal courts are broad, *United States v. Swift & Co.*, 286 U.S. 106 (1932), but they are not unlimited. Courts may occasionally be under an obligation to modify consent decrees to *conform* to intervening law, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), but to permit modification of a consent decree *contrary* to intervening law would plainly constitute an impermissible expansion of the remedy beyond the nature and extent of the violation. *Hills v. Gatreaux*, 425 U.S. 282 (1976).

The court of appeals compounded the error by approving the override of a neutral, bona fide seniority system that was not challenged as discriminatory and which clearly is protected under both Title VII and § 1981. Few principles of Equal Employment law are as firmly established as that which legally immunizes seniority systems implemented without discriminatory intent. Reflecting that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this

Nation," *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976), this Court has resolved competing interests by awarding retroactive seniority to identifiable victims of hiring discrimination while leaving bona fide seniority systems intact. *Franks v. Bowman, supra.* Such relief was designed by Congress to provide "the most complete relief possible" for victims of hiring discrimination, *Teamsters v. United States*, 431 U.S. at 347. The First Circuit's seniority override plainly is not called for here, since the First Circuit conceded the absence of identifiable discriminatees.

Congress recognized that neutral, bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined as part of Title VII that the protection of bona fide seniority systems was of overriding importance. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Hence, a bona fide seniority system cannot be overriden over the objections of the employer and to the detriment of readily identifiable incumbents. *Pullman Standard v. Swint*, 102 S. Ct. 1781 (1982); *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982). The protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979).

As this Court concluded recently, "seniority plays a central role in allocating benefits and burdens among employees," and "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination." *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057, 3070 (1982).

This case concerns fundamentally the preservation of a bona fide seniority system in the face of a judicially-imposed scheme to achieve racial balance untied to relief for identifiable discriminatees. Accordingly, this Court need not, and should not reach a constitutional issue of

"reverse discrimination" as discussed by the First Circuit. *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944). This Court need only reaffirm its long line of decisional law recognizing Congress' intent to preserve bona fide seniority systems to reverse the First Circuit's order and disapprove the modification request.

ARGUMENT

I. THE COURT BELOW EXCEEDED ITS REMEDIAL AUTHORITY IN OVERRIDING A CONCEDEDLY VALID SENIORITY SYSTEM BASED UPON SUPERSEDED FINDINGS OF UNINTENTIONAL HIRING DISCRIMINATION, PARTICULARLY AS THE ORDER WAS DESIGNED TO BENEFIT PERSONS WHO WERE NOT IDENTIFIABLE VICTIMS OF DISCRIMINATION

A. Modification of the Consent Decree on the Basis of Findings of Unintentional Discrimination Expressly Contradicts *Washington v. Davis* and its Progeny

In both of these consent decree cases, suit was initially brought under 42 U.S.C. §§ 1981 and 1983. In each instance, there were court findings that recruitment and hiring discrimination was unintentional, the trial court having concluded that past discrimination was based on only the adverse effect of these practices on minorities. Since the litigation leading to the original consent decrees in these cases, this Court has clarified the burden of proof necessary to sustain a violation of Section 1981 and specifically stated that the discrimination theory underpinning the decrees in this case was incorrect. As a result, the modification of these decrees to achieve racial balance in layoffs is impermissible because the district court's modification order rests on insufficient proof to establish a violation.[8]

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[8] In the "fire" case, the United States brought an action in 1973 which included Title VII claims. See Cert. Pet. No. 82-185 at A7. The lower courts and this Court addressed the instant cases in

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court held that intentional or purposeful discrimination must be proved in order to establish a violation of the Fifth or Fourteenth Amendment. More recently, this Court confirmed that the same proof of intent is required under Section 1981. *General Building Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1981). *See also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976). Any doubt about the insufficiency of the lower court's findings of adverse effect to support constitutionally-based violations *in this particular case* was resolved in *Washington v. Davis*. For, in its opinion, this Court specifically discredited an earlier opinion of the First Circuit in this proceeding precisely because of indications of an inappropriate correlation between unintentional discrimination and constitutional violations. 426 U.S. at 244, n.12, *citing, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). "[T]o the extent that [*Castro v. Beecher*] rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation," this Court declared, "we are in disagreement." *Id.* at 245.

Inexcusably, the opinion of the First Circuit did not so much as make reference to this aspect of the Court's opinion in *Washington v. Davis*. Rather, the court of appeals merely expressed uncertainty over the effect of the decision on this case, and thereafter concluded that the answer made no difference. "[I]n any event," the First Circuit surmised, since the district court "conclusively established" a "pattern of relief," neither *Washington v. Davis* nor *Arlington Heights v. Metropolitan Housing De-*

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terms of the burdens of proof applicable to § 1981 actions. See *Washington v. Davis*, 426 U.S. at 244 n.12, *citing with disapproval, inter alia, Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). And, as argued below, the First Circuit clearly exceeded the remedial principles of Title VII and § 1981 as they relate to seniority systems.

velopment Corp., 429 U.S. 252 (1977),[6] "stands in the way" of consent decree modification.[7] Cert. Pet. No. 82-185 at A13. Consequently, not only did the First Circuit entirely ignore this Court's disapproval of *Castro v. Beecher*, but it used the original (and, since, determined to be insufficient) findings of unintentional discrimination in hiring to *extend* its order to layoff procedures—an area not even addressed in the original decree. In so doing, the court of appeals misread the district court's power to expand its remedial order as insulated from the legal limitations and restrictions imposed by the decisional law of this Court.

B. The First Circuit Incorrectly Modified the Consent Decree Without Conforming its Order To Intervening Law Directly Applicable to Its Earlier Substantive Discrimination Findings

Here the consent decree modification failed to take into consideration the intervening decisional law of this Court. Misconstruing the district court's power to reshape consent decrees as virtually unlimited, the court of appeals improperly approved a modification which, as shown above, runs contrary to this Court's ruling in *Washington v. Davis*.

In approving the consent decree modification as a legitimate exercise of the district court's power, the First Cir-

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[6] In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court reaffirmed that official action will not be held unconstitutional solely because it results in racially disproportionate impact.

[7] "It is by no means clear," said the First Circuit, "that our decisions in the police and fire cases should have been different had they been decided after *Washington v. Davis* and *Arlington Heights* . . . ." Cert. Pet. No. 82-185 at A13. The court of appeals below did not elaborate on the reason for this lack of clarity, perhaps because there is no conceivable answer to the fact that its earlier opinion lacks continuing force either to support a substantive violation or to justify its broad seniority-related remedy.

cuit relied upon this Court's opinions in *United States v. Swift & Co.*, 286 U.S. 106 (1932), and *United States v. United Shoe Corp.*, 391 U.S. 244 (1968). In both cases, this Court approved significant modifications of antitrust-related consent decrees. But in neither case was modification predicated on changes that violated or contravened intervening law. Accordingly, neither case supports the view reflected in the First Circuit's opinion that once a district court approves a "pattern of relief" in a consent decree, subsequent Supreme Court decisional law is not only irrelevant, but can properly be violated in the course of consent decree modification.

Indeed, in many instances, courts are under an obligation to modify consent decrees to *conform* to intervening law. In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), for example, this Court was confronted with the refusal of a district court to modify its earlier injunction. The terms of the injunction were inconsistent with the intervening ruling in *Swann v. Board of Education*, 402 U.S. 1 (1971), and were also ambiguous. Because of these two factors, the Court held, it was an abuse of discretion for the district court *not* to modify its earlier injunction. *Cf. System Federation No. 91 v. Wright*, 364 U.S. 642, 650 n.6 (1961) ("[t]here are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction" (citing cases)).

Similarly, the effect of intervening law will sometimes so impair the validity of a consent decree that courts properly vacate the decree entirely. The First Circuit, for example, approved such a vacatur in *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975). There the court of appeals found that the district court did not abuse its discretion in vacating the decree because a subsequent Supreme Court decision "represented a fundamental

change in the legal predicates of the consent decree." *Id.* (footnote omitted). The First Circuit declared, *id.* at 602, that:

> It may well be unreasonable to require defendant, for the indefinite future, to abide by a consent decree based upon an interpretation of law that has been rendered incorrect by a subsequent Supreme Court decision.

To be sure, a change in decisional law does not necessarily *mandate* consent decree modification to conform the decree with recent case law.[8] As the Fifth Circuit has stated, however, "[w]hen an injunction *is* modified on the basis of an intervening change in decisional law, *that modification must be justified by the new decision.*" *United States v. Georgia Power Co.*, 634 F.2d 929, 934 (1981) (emphasis supplied). By the same token, a request to modify an injunction on the basis of a change in factual circumstances cannot supply any justification for a ruling *directly contrary* to intervening decisional law. By permitting the district court to reopen the decrees to reflect later factual developments relating to matters not covered previously, but at the same time ignoring Supreme Court precedent reflecting direct disapproval of its previous substantive holdings in this case, the First Circuit impermissibly expanded its equitable power.

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[8] The courts are split over whether a change in decisional law alone is sufficient ground for a Rule 60(b)(5) modification. See *United States v. Georgia Power Co.*, 634 F.2d 929, 933 (5th Cir. 1981) (cases cited therein). In any event, the intervening decisional law of this Court should not impair the validity of the original decree. As this Court observed in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1930) (emphasis supplied), an "injunction, whether right or wrong, is not subject to impeachment in its application *to the conditions that existed at its making.*"

II. FEDERAL EEO LAW, AS INCORPORATED IN STATUTE AND AS CONSTRUED BY THIS COURT, PROHIBITS EXPANSION OF THESE HIRING-BASED CONSENT DECREES TO ALTER LAYOFF PROCEDURES IN A MANNER THAT DIRECTLY OVERRIDES A NEUTRAL, BONA FIDE SENIORITY SYSTEM

A. The First Circuit's Seniority Order Was Improper Because It Was Not Limited to Remedying the Hiring Violations To Which the Remedial Provisions of the Decree Were Restricted

The power of a federal court to modify a consent decree is not unlimited but is subject, at a minimum, to the supreme law of the land, as embodied in federal statutory and decisional law. As this Court stated in *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976), a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Id.* at 293-94, *quoting Milliken v. Bradley*, 418 U.S. 717, 744 (1974). For several reasons, the First Circuit's Order was contrary to these elementary remedial principles.

The underlying allegations of substantive Title VII violations were limited to recruitment and hiring violations and the consent decree treated only those matters. There has been no determination that the departments failed to take the necessary steps to comply with the decrees. Moreover, there has been no challenge to the validity of the seniority systems established by state statute and respondents have conceded that laying off on a last-hired, first-laid off basis would not be an independent violation of the rights of minority officers. Accordingly, although the First Circuit purported merely to effectuate its remedial relief for hiring discrimination, it, in effect, overrode a bona fide seniority system as if the system had been found to violate Title VII.

More specifically, the consent decrees here in issue stem from court findings of unintentional discrimination in the

hiring process of the police and fire departments that led to underrepresentation of black and hispanic employees. Hiring procedures were subsequently changed in accordance with the terms of the remedial orders. In the opinion here under review, the First Circuit recites statistics demonstrating that "[t]he district court's remedial orders in both cases have produced marked progress eliminating the present and continuing effects of past discrimination." Cert. Pet. No. 82-185 at A10.

The original consent decrees made no provision for the procedures to be used if layoffs were required. The validity of layoff procedures simply was not challenged and was not in issue. The court of appeals nevertheless concluded that modification of the decrees to regulate layoffs was appropriate and required so as not to vitiate the decrees' original intended effect. The original intent of the decrees, however, was to correct the hiring procedures only. The court of appeals thus impermissibly approved use of federal equitable power beyond the scope of the remedy necessary to rectify the perceived violation. *Cf. Hills v. Gautreaux, supra; Milliken v. Bradley, supra.*

In *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), Justice Marshall spelled out how the courts should approach requests for consent decree modification. Consent decrees, he observed:

> cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

The court of appeals plainly ignored this cautionary dictum, relying on "new and unforeseen conditions" to justify a modification never contemplated by the parties and not directed to rectifying the only employment pro-

cedures the district court identified as discriminatory. Ignoring the fact that layoff procedures were specifically established by statute and beyond the power of the parties to modify, the First Circuit speculated that had the parties anticipated the need for layoffs, "they would have incorporated some provisions addressing its potential impact into the decrees." Cert. Pet. No. 82-185 at A15. Settlements, however, are "not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators," *Officers for Justice v. Civil Service Comm.*, 29 FEP Cases 1473, 1480 (9th Cir. 1982) (emphasis in original), *citing, inter alia, In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212 (5th Cir. 1981); *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975,) *cert. denied*, 424 U.S. 967; and *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 849 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In sum, the First Circuit's ruling impermissibly would subject parties to a consent decree to a virtually unlimited power of modification by district courts whose lodestar would be their determination of what the parties would have agreed to on a certain issue if indeed they had thought about it.

B. Expansion of the Consent Decrees To Include Layoffs Impermissibly Overrode A Neutral, Bona Fide Seniority System

The First Circuit's error in approving expansion of the decrees, moreover, was particularly egregious because in doing so it thereby approved the override of a neutral, bona fide seniority system. The court of appeals in its opinion recognized that the district court's order prohibiting layoffs from reducing the current level of minority representation "superseded the operation of the reverse seniority layoff provisions" of the Massachusetts

civil service law—a law incorporating a seniority system which the court plainly addressed as "bona fide." [9] Cert. Pet. No. 82-185 at A16-17. The First Circuit also discussed those decisions of this Court in which the immunity of bona fide seniority systems under Section 703(h) of Title VII was unequivocally established. *Id.*, *citing Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); and *American Tobacco Co. v. Patterson*, 97 S. Ct. 313 (1982). The court of appeals concluded, however, that none of these cases applied here: "We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption and application of a bona fide seniority system." Cert. Pet. No. 82-185 at A19.

As in its treatment of the burden of proof under Section 1981, the First Circuit ignored the clear import of this Court's decisions. In the *American Tobacco* case, for example, this Court established unconditionally that seniority provisions or systems, whether adopted before or after Title VII, are immunized under Section 703(h) [10] unless it can be proven that the adoption or maintenance of the system resulted from intentional discrimination. The protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24

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[9] Respondents readily declare that they did not seek from the courts below a determination of the invalidity of the Massachusetts seniority statute because of any discriminatory impact of its operation. Br. Op. Cert. at 16.

[10] § 703(h), in pertinent part, provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

(1979). *Wattleton v. Boiler Makers*, 29 FEP cases 1389, 1394 (7th Cir. 1982), *citing Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 (5th Cir. 1978).[11]

The fundamental error of the First Circuit was to elevate the equitable power of district courts to the level of sanctioning orders that conflict with the unequivocal intent of Congress. It is indisputable that minority employees often possess less seniority, and that neutral and bona fide seniority systems may have a disproportionate impact on the employment opportunities of such employees. Congress *recognized* that neutral bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined that the protection of bona fide seniority systems was of overriding importance.[12] As its resolution of competing interests, Congress determined that "[p]ost-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . . *without attacking the legality of the seniority system* as ap-

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[11] *See also Chance v. Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007, *cert. denied*, 431 U.S. 965 (1977); and *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1972) (employment practices which are not violative of Title VII should be immune from attack under § 1981).

[12] Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects of the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, 444 U.S. 598 (1980) (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

plied to them" (emphasis added). *Teamsters v. United States*, 431 U.S. at 347. Here, the First Circuit, in effectively nullifying the operation of a bona fide seniority system, acts not for the benefit of any identifiable discriminatees but only to the detriment of "the legitimate expectations" of identifiable incumbents "innocent of any wrongdoing." *Id.* at 372.

The specific legal protections afforded bona fide seniority systems, however, were disregarded by the First Circuit. "While seniority was the normal way to decide who must go first," the court of appeals acknowledged, "there is nothing magical about seniority . . . ." Cert. Pet. No. 82-185 at A25. The court's facile approach to seniority violates the clear Congressional intent, expressed in Title VII's legislative history, to preserve the operation of last-in, first-out layoff provisions under bona fide seniority systems:

> [I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of race.

See 110 Cong. Rec. 7207 (1964) (statement submitted by Sen. Clark).[13]

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[13] And as stated above, this Court's decision in *American Tobacco v. Patterson* held that the protections that Title VII gives to seniority systems applies to those systems enacted both before and after

Similarly, Senators Clark and Case placed an interpretive memorandum into the Congressional Record, *id.*, which stated:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes were

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the effective date of Title VII. It should be noted that the statutory basis of the seniority system here affected does not justify treatment different from that which would obtain for a private sector, collectively-bargained seniority system. Seniority-based layoff provisions in both the public and private sector have proliferated because they reward service, loyalty and stability; they make for increased efficiency and safety in times of layoff; and, by securing each worker's place in the hierarchy of the organization, they improve labor relations. Moreover, they benefit all workers equally; as the most senior workers have paid their dues on layoff in years past, the least senior workers will be compensated for their time on layoff with job security in the future.

Neither employers nor unions have any interest in losing minority or nonminority workers. The current economic climate and the resulting layoffs are beyond the control of any single employer, union or group of workers; the alternatives to seniority-based layoffs are not always workable organizationally; a significant majority of workers have viewed and will continue to view seniority-based layoffs as the preferred alternative; and the problem, by law, is one properly within the sphere of state statute or collective bargaining. As recognized by this Court, "Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers v. Bryant*, 444 U.S. at 608. See also footnote 14, below.

> hired, to give them special seniority rights at the expense of the white workers hired earlier.[14]

Numerous circuit courts of appeals have given effect to this clear Congressional intent. The Second Circuit has explicitly declared that a facially-neutral excessing plan, which operates on the concept of "last-hired, first-fired," does not discriminate against minorities who are disproportionately affected. *Chance v. Board of Examiners, supra*, 534 F.2d at 997. The Third, Fifth and Seventh Circuits have agreed. *Id., citing Waters v. Wisconsin Steel Workers of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co. v. Local Union 327*, 508 F.2d 687 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Watkins v. Steel Workers Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Similarly the First Circuit's approach fails when analyzed in light of this Court's recent reaffirmation that "seniority plays a central role in allocating benefits and burdens among employees," and that "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057, 3070 (1982). The First Circuit's decision assures jobs to non-identifiable victims at the expense of innocent incumbents. Warning against this kind of situation, *id.*, the Court stated that:

> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining

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[14] *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978) (an employer has no "duty to adopt a hiring procedure that maximizes hiring of minority employees").

> a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the "large objectives" of Title VII, *Albermarle Paper Co v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted) require innocent employees to carry such a heavy burden. (notes omitted.)

Indeed, so clear are the legal protections afforded the Massachusetts seniority statute that it was unnecessary and entirely inappropriate for the First Circuit to address an issue of "unconstitutional reverse discrimination." See Cert. Pet. No. 82-185 at A20-26. Federal courts should "avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Regents of the University of California v. Bakke*, 438 U.S. 265, 411 (Stevens, J., concurring in the judgment in part and dissenting in part). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication," this Court has declared, "it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), *cited in Bakke*, 438 U.S. at 411. *See also Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Here, the explicit statutory protection given bona fide seniority systems provided a sufficient and adequate ground upon which to deny respondents' request for modification.

Unfortunately, in reaching out improperly to address the question of "unconstitutional reverse discrimination," the First Circuit misconstrued this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 192 (1979), suggesting that the decision supports the result reached by the court of appeals here. In *Weber*, this Court approved

a private, race-conscious affirmative action plan, recognizing that employers may engage in *voluntary* affirmative action efforts *beyond* that which they may be compelled to undertake by government regulation. Even there, the Court permitted the AAP only because it did not unnecessarily trammel the interests of the white employees" and did *"not require the discharge of white workers and the replacement with new black hires." Id.* at 207 (emphasis added). Accordingly, although *Weber* stands for the proposition that Congress did not intend to prohibit private sector employers from taking certain steps *voluntarily*, *Weber* cannot be expanded to authorize the forced abolition of a bona fide seniority system.

Subsequently, many courts have concluded that a *voluntary* affirmative action plan implemented by a state employer will not violate Title VII if it is valid under *Weber*. *La Riviere v. EEOC*, 28 FEP Cases, 1481, 1484 (9th Cir. 1982); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 688-90 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *United States v. City of Miami*, 664 F.2d 435, 461 (5th Cir. 1981) (en banc). But in the posture of this case, *no such voluntary efforts are involved.* Rather, the employer, which has been operating lawfully under a hiring-based consent decree, here seeks to preserve its statutorily-mandated, neutral seniority system, a goal which draws support from this court's *Weber* opinion.[18]

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[18] In *Weber*, this Court observed that:

> Title VII could not have been acted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisputed to the greatest extent possible." *United Steelworkers v. Weber*, 443 U.S. at 206.

See also footnote 12, *supra*.

Nor, it should be added, do this Court's decisions in *Bakke* and in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), support the result reached below. In announcing the judgment of the Court in *Bakke*, Justice Powell declared "facially invalid" the governmental purpose of assuring a specified percentage of minority participation in the university's special admission program. He stated that if no specific instance of discrimination occurred, government cannot constitutionally order racial and ethnic preference for the purpose of remedying past "societal" discrimination against minorities generally. Accordingly, since the underlying findings of discrimination in this case have been discredited by this Court earlier in *Washington v. Davis*, *supra*, there is no basis upon which *Bakke* may be used as support for the lower court's decision to change the existing seniority system.

Fullilove is equally unavailing to support the First Circuit's decision. In that case, a minority business set-aside in a federal public works program survived constitutional challenge in significant part because *Congress* had found racial discrimination in the construction industry and was exercising its enforcement powers under Section 5 of the Fourteenth Amendment to remedy the problem. 448 U.S. at 476. In this case, on the other hand, the court of appeals is approving the override of a state-enacted seniority system of the type specifically protected by Congress in Title VII.

In sum, no constitutional principles justify the override of the Massachusetts layoff provision. Moreover, given the impact of the district court's modification order on the rights of innocent, identifiable incumbents, this Court's civil rights cases prohibit the First Circuit's modification of the state's neutral, bona fide seniority system.

CONCLUSION

For the foregoing reasons, the Amicus, EEAC, respectfully urges that the decision of the First Circuit should be reversed with instructions that the District Court deny the request for modification of the consent decrees so as to preclude override of the operation of the layoff provisions incorporated in the Massachusetts seniority statute.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
v.
BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

INTEREST OF THE IAFF AS AMICUS CURIAE*

The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

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* This brief is filed with the consent of all parties. The letters of consent have been filed with the Clerk of the Court.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are facing, or may face, the prospects of layoffs caused by fiscal exigencies such as those which were carried out by the City of Boston, and who are employed pursuant to seniority systems established by state and/or local law.

The prospects of reductions-in-force in these jurisdictions are not merely conjectural. In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," Government Employee Relations Report, GERR No. 949, February 8, 1982, pp. 13-15.

The financial situation among local governments similarly indicates a stark outlook. In a survey of 100 cities, 62 have laid off or were expecting to layoff employees in fiscal year 1982. Many of these jurisdictions are covered by civil service laws which contain seniority-based layoff provisions that determine the order in which employees will be furloughed in work force reductions. Like Boston, many cities whose firefighters are members of the IAFF have also entered into consent decrees to settle employment discrimination lawsuits. Government Employee Relations Report, supra, at 23-36. There is no indication that the financial problems of state and local governments will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

This brief addresses the central question raised in this case: May a federal court enjoin the operation of a *bona fide* seniority system which effects delays in the attainment of minority employment quotas agreed to in a consent decree absent any findings of intentional discrimination?

The minority-conscious percentage goals which in part formed the basis of the voluntary settlement of the original proceedings in this case in 1974 were arrived at after findings by the District Court that the hiring and recruitment practices of the Boston Fire Department, although not discriminatory in purpose, had resulted in a disproportionate number of minority applicants being denied entry into the Department's workforce. *Boston Chapter, NAACP Inc. v. Beecher*, 371 F.Supp. 507 (D. Mass. 1974). In the consent decree, the parties agreed to certain alterations in these hiring and recruitment procedures to secure for minorities greater access to employment with the Department. Specifically, these changes included the certification and hiring of minority applicants on a priority basis until such time as the percentage of minority employees in the Department reached the same level as the percentage of minorities in the surrounding community. *Id.*

The purpose of the decree was not to reform the terms and conditions governing Department employees; rather it was only to correct an imbalance in the number of applicants who became employees. No seniority-based relief is contained in the consent decree. *Id.* at 520-523.

The purpose of this brief *amicus curiae* is to explore the ramifications of the lower court's modification of the consent decree to enjoin layoffs on a last-hired, first-laid off basis pursuant to a *bona fide* seniority system and to show that the lower court's action in these circumstances

exceeded the well-established limitations placed upon the federal judiciary by the Constitution.[1]

SUMMARY OF ARGUMENT

The *legal* foundation for the original consent decree rested on the equal protection clause of the Fourteenth Amendment, Section 1981, and Title VII. The *factual* foundation for the decree was that the recruitment and hiring processes resulted in a disparate impact on the percentage of minorities in the workforce, although no intentional discrimination had occurred. Thus the District Court imposed, with the consent of the parties, affirmative requirements designed to boost the number of minorities entering the Department in order to recast the overall employee complement to reflect a greater percentage of minority workers.

Two significant decisions of this Court post-dated the decree. First, in 1976, this Court decided that disproportionate racial impact alone was insufficient to make out an equal protection violation—proof of discriminatory racial purpose is required as well. *Washington v. Davis*, 426 U.S. 229 (1976).

Second, last term, this Court confirmed that liability should not be imposed under Section 1981 without proof of intentional discrimination. *General Building Contractors Assn. v. Pennsylvania*, —— U.S. ——, 73 L.Ed. 2d 835 (1982).

These developments severely eroded the legal predicates of the decree insofar as its continuing prospective vitality was concerned. Due to the lack of a finding of intentional discrimination on the facts which gave birth to the decree in the first place, any additional equitable relief requested by the plaintiffs could no longer be based on the Fourteenth Amendment or Section 1981. Until 1981, however,

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[1] We do not here express an opinion on the Tenth Amendment issues posed by the State of Massachusetts.

these developments were of little moment to this case because the relief being implemented was adequately supported by the remaining Title VII findings.

In 1981, however, financial requirements in Boston caused the City to undertake reductions in force. State statute required such reductions to occur on a reverse seniority basis. Those minority employees who had benefitted from the decree by being hired into the Department had been accorded seniority as of their dates of entry into the workforce. No findings of identifiability of victims of the City's unintentional discrimination had occurred, and no rightful place seniority relief was contemplated in the decree. The seniority-based reductions in force, concedely neutral, nevertheless consequently affected these minority workers in greater numbers than non-minority employees with earlier dates of hire. Pet. App. A1-A26, A30 et seq.

Plaintiffs returned to the District Court seeking modification of the decree to prevent these layoffs. Joint App. 42a. Otherwise, plaintiffs argued, the gains achieved under the decree would be vitiated by virtue of the disproportionate number of minorities who possessed insufficient seniority to avoid the layoffs. Pet. App. A2.

The powers of the District Court at that point, however, were severely circumscribed. Possessed of no findings of discriminatory purpose, the underlying Constitutional and Section 1981 bases for its earlier orders no longer retained any vitality and could not justify any further relief. Title VII remained available to support maintenance of the status quo except for the fact that the layoffs were seniority-based with no discriminatory overtones. There existed no previous finding and no current basis for holding that the statutory layoff system was anything other than a *bona fide* seniority system protected by Section 703(h) of Title VII.

Because the equity powers of the court were limited to those remedies provided by the statute upon which its jurisdiction to issue the decree was based, and because the goals of the decree necessarily paralleled the purposes of the statute, the Court was powerless to grant plaintiffs additional relief which was proscribed by the statute.

Accordingly, because Section 703(h) preserved the operation of the seniority system as an exception to Title VII's prohibition against unlawful practices and procedures that tend to perpetuate the effects of prior discriminatory employment practices, the layoffs pursuant to the seniority system could not be enjoined despite the effect they might have had upon the achievement of the racial goals embodied in the consent decree.

The principle we urge this Court to uphold in this case is that a seniority system, formulated and operated without any discriminatory purpose or intent, may not be enjoined or superseded by a district court merely because its operation may effect delays in the attainment of employment quotas contained in a consent decree issued in response to findings of unintentional discrimination in hiring.

ARGUMENT

THE OPERATION OF A BONA FIDE SENIORITY SYSTEM MAY NOT BE ENJOINED EVEN THOUGH IT MAY EFFECT DELAYS IN THE ATTAINMENT OF MINORITY EMPLOYMENT QUOTAS AGREED UPON IN A CONSENT DECREE.

A. The Seniority System In Question.

This Court has long recognized the "vast and increasing importance" of seniority in this country's system of employment. *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747, 765 (1976). "Competitive status" seniority, which determines "who gets or who keeps an available job" in a layoff situation, has been described by

this Court to possess "overriding importance" because it affects the economic security of an employee more than any other term or condition of employment. *Id.* at 766. *See, American Tobacco Company v. Patterson*, —— U.S. ——, 71 L.Ed.2d 748 (1982).

In the area of employment discrimination, the routine application of systems of competitive seniority which have been created or operated without a racially discriminatory purpose has been immunized from the statutory proscriptions against employment practices which, although neutral on their face and in intent, nonetheless discriminate in effect against a particular group. *Teamsters v. United States*, 431 U.S. 324, 348-354 (1977).

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), specifically provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . ."

As this Court concluded in *Teamsters*, "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352. In so holding, the Court acknowledged that the longest tenure employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to 'freeze' the status quo of prior discriminatory employment practices.' " 431 U.S. at 350. Nevertheless, this Court recognized that this perpetuation effect could not overcome "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and

thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.[2]

Seniority in this case exists by virtue of a Massachusetts statute which defines seniority of a civil service employee to mean "ranking based on length of service [which] shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period. . . ." Mass. Gen. Laws Ch. 31, Section 33. Under this statute, seniority controls in situations wherein permanent employees "are to be separated from [their] positions because of lack of work or lack of money or abolition of positions." Mass. Gen. Laws Ch. 31, Section 39. "[E]mployees senior in length of service . . . shall be retained the longest and reinstated first." *Id.*

The statute goes on to provide specific procedures applicable to the operation of the seniority system.[3] There has at no time been any challenge mounted to the neutrality and non-discriminatory genesis and operation of

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[2] It is of no legal consequence whether the discriminatory impact being perpetuated occurred before or after the passage of the Act. *American Tobacco Company v. Patterson, supra,* —— U.S. at ——, 71 L.Ed.2d at 748-749.

[3] Section 703(h) does not define the term "seniority system." This Court has interpreted the term to mean "a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Association v. Bryant,* 444 U.S. 598, 605-606 (1980). "The example of a 'seniority system' most frequently cited in the congressional debates was one that provided that the 'last hired' employee would be the 'first fired.'" *Id.* at 605, fn. 10.

There can be no serious dispute that the provisions of the Massachusetts statute represent what this Court has considered "the core concepts of 'seniority.'" *Id.* at 606. Rights of employees are determined solely according to length of employment. The principal feature of the Massachusetts system, "like any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *Id.* For these reasons, the seniority system involved here falls within the meaning of Section 703(h) of the Act.

this system. Its continued operation is therefore correct and proper under Title VII, even though it may perpetuate past discrimination by the employer.[4]

B. The Effect Of The Seniority System Upon The Consent Decree.

The Consent Decree which formed the basis for the lower courts' orders was entered in 1974 after findings by the District Court that the City's employment entrance examination was not job-related and had a disproportionate impact on minority hiring, and that a word-of-mouth recruitment policy also resulted in unintentional racial discrimination.

With the agreement of the parties, the Court decreed that a job-related examination be developed, that minority applicants be actively recruited, and that priority certification groups for Black and Hispanic applicants be created and continue in effect until percentage goals equivalent to the percentage of minorities in the surrounding community had been met. The consent decree contained no provisions related to seniority or layoffs. *Boston Chapter, NAACP v. Beecher, supra,* 371 F.Supp. at 520-523.

Compliance with the consent decree has been met in all respects. Although minority percentage goals have not yet been achieved, this is in no way due to a lack of compliance.

In 1981, the City of Boston became faced with budgetary restrictions resulting from the passage of a tax limitation proposition by the voters of Massachusetts. The City decided to deal with its financial difficulties, in part,

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[4] The seniority system is valid under both the U.S. Constitution and the Civil Rights Act of 1866, 42 U.S.C. § 1981, absent a showing of discriminatory purpose in its inception or operation. See *Washington v. Davis,* 426 U.S. 229 (1976) (Fourteenth Amendment); *General Building Contractors Association, Inc. v. Pennsylvania,* —— U.S. ——, 73 L.Ed.2d 835 (1982) (Section 1981).

by extensive reductions in its employment force. As noted above, Massachusetts law dictates that such reductions occur on a reverse seniority basis. As a consequence of the routine application of the "last-hired, first-laid off" provisions of the Massachusetts seniority statute, some minority employees hired as a result of the remedial measures contained in the consent decree would have lost their jobs temporarily.[5] Pet. App. A30 *et seq.*

This effect of the seniority system, and this effect alone—i.e., the temporary delay in the complete realization of the voluntarily-agreed upon quotas in the workforce—formed the basis for the lower court's modification of the consent decree to enjoin the routine operation of the system. As the Court of Appeals acknowledged, its sole concern was to preserve "the progress made to date in integrating the departments." Pet. App. A24.

C. The Courts Below Exceeded Their Authority In Enjoining The Routine Operation Of The Seniority System.

The original consent decree was founded on findings of violations of the Fourteenth Amendment, Section 1981, and Title VII based on the disparate impact of the City's hiring and recruitment practices. Because of intervening

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[5] It is significant to note that none of those minority applicants who had sought employment with the Fire Department prior to the entry of the decree and who subsequently were hired would have suffered from the 1981 layoffs, due to the longevity of their employment. See Pet. App. A23, n.14. The minority employees who would have been laid off absent the District Court's injunction all applied for positions for the first time well after the decree was entered. Over the objections of the petitioners, both the District Court and the Court of Appeals found it unnecessary to undertake any evidentiary inquiry on this point. Pet. App. A24. Relief was granted despite the absence of any finding that the employees to be affected by the layoffs were in fact "identifiable victims of racial discrimination." *Cf. Franks v. Bowman Transportation Co., supra,* 424 U.S. at 772.

changes in the law, only the Title VII findings remain a viable basis for relief, and then only within the statutory confines of the remedies contemplated by Congress. Within these confines there exists no proper authority for the injunction against the routine operation of the seniority system granted by the courts below.

1. *The Fourteenth Amendment.*

The original consent decree was entered before this Court's opinion in *Washington v. Davis*, 426 U.S. 229 (1976). *Washington v. Davis* arose on a similar factual pattern to this case but resulted in a wholly opposite result. In *Washington*, this Court rejected the proposition "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239. This Court specifically expressed its disagreement with the contrary holdings of certain Courts of Appeals "that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications." *Id.* at 244. Among those decisions identified as being founded on that faulty premise was the holding of the First Circuit in the Boston police case (*Castro v. Beecher*, 459 F.2d 725, 732-733 (1st Cir. 1972)). *Id.* at 244, fn. 12. As this Court is well-aware by virtue of its grant of certiorari in *Boston Police Patrolmen's Association, Inc. v. Castro, et al.*, No. 82-246, the holding in the Boston police case culminated in a decree virtually identical to the consent decree underlying the issue presented here. Plainly, had either the parallel police case or this case been before the Court at the time of *Washington v. Davis*, reversal would have occurred.

Thus, *Washington v. Davis* wholly discredits the constitutional predicate of the consent decree in the clearest terms. When the decree in this case was originally made, it might have been said that the issue of the need to prove intent was in doubt. In 1981 when modification was sought, no such doubt existed.

Had the same facts then been brought before the District Court, no Constitutional violation could have been found. Certainly by 1981, to reconfirm the earlier defective findings as a basis to deny a modification in favor of the defendants or to grant further relief to the plaintiffs constitutes abuse of judicial discretion. The Court of Appeals' cavalier disregard of this Court's evaluation of its earlier holding represents such an abuse. *Cf. System Federation No. 90 v. Wright*, 364 U.S. 642, 648, 652 (1961); *Chance v. Board of Examiners*, 561 F.2d 1079, 1085 (2d Cir. 1977) (dictum); *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975). *See, Chance v. Board of Examiners*, 79 F.R.D. 122, 127 (S.D. N.Y. 1978).

2. *Section 1981.*

The original consent decree was entered before this Court's opinion in *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d 835 (1982). In the *General Building Contractors* case, this Court held that the Civil Rights Act of 1866, 42 U.S.C. § 1981, was directed at intentional discrimination only. Thus, the Court ruled that liability may not be imposed under Section 1981 without proof of purposeful discrimination.

For the same reasons that the Constitutional predicate for modification of the consent decree was vitiated by the intervening interpretation of the law, so too has the Section 1981 underpinning for the decree now been eroded. See discussion *supra*, pp. 11-12.

3. *Title VII*

Hence, the only possible statutory basis remaining for the District Court's exercise of its general equitable power to modify a decree was Title VII. Even under Title VII, however, a federal court's powers in equity are not boundless. Where private litigants assert claims arising under federal statutes, federal courts may exercise their jurisdiction to fashion relief only to the extent consistent with the applicable statute. *See, System Federation No. 90 v. Wright*, 364 U.S. 642, 651 (1964) ("[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce."); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-652 (1963). When the authority of the federal courts derives from an Act of Congress, substantive rights simply do not exist if they are not created by the statute. "[I]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *TVA v. Hill*, 437 U.S. 153, 195 (1978).[6] In other words, the mere concern that harm has occurred does not empower a court to exercise its injunctive powers if the harm is the result of an act which is protected by statute.

The objectives of Title VII have been reiterated by this Court on many occasions. The rights and remedies thereunder have been subjected to the closest of scrutiny. Insofar as seniority rights are concerned, this is not a case where the statute is ambiguous or silent so that

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[6] Title VII, of course, epitomizes Congress' formulation of public policy. When Congress so acts, it supplants with its own views any judicial determination of public policy. *Cf. United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 245 (1952) (Frankfurter, J., dissenting). Compare *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Northwest Airlines v. Transport Workers*, 451 U.S. 77 (1981).

the Court must analyze whether Congress intended to create the remedy asserted. *Cf. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979). Rather, as shown earlier, here the statute on its face is explicit in its directive that the operation of a legitimate seniority system is inviolate and shall not be overridden despite any disparate impact it may cause. The proposition that a federal court may shunt such clearly expressed legislative intent simply because it perceives the equities of a case before it to so dictate is repugnant to the approach established in this Court's decisions. Nevertheless, that is precisely what the courts below have done.

Under the guise of protecting progress toward an ultimate agreed-upon resolution of an unintentionally discriminatory *hiring* system, the lower courts have undertaken to enjoin the routine operation of a statutorily protected *seniority* system. Although superficially, the relief accorded—requiring the maintenance of separate minority and nonminority lists with respect to seniority for layoffs and recall—might seem to fall within that type of constructive seniority relief sanctioned by this Court's opinion in *Franks v. Bowman Transportation*, *supra*, the Court of Appeals expressly disavowed this notion—"[t]his case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination. Pet. App. A20-A21. In fact, the Court of Appeals lamented the fact that "such a limited remedy [i.e. an award of constructive seniority to actual discriminatees] would result in minority ratios far below that set by the district court." Pet. App. A23.

The tone of the Court of Appeals' opinion is decidedly legislative, which must subvert it. *Cf. Northwest Air-*

lines v. Transport Workers, supra, 451 U.S. at 97-99. Not satisfied with the remedies envisioned by Congress as within the statutorily invested powers of the court, the Court of Appeals embarked upon the defense of a decree to which the parties might have but did not agree. Declaring its responsibility to protect the public interest which it perceived to require additional protection, and ignoring the Congressional considerations underlying the statute which constitutionally represents the protection of the public interest,[7] the Court of Appeals decried the unfairness of "the imposition of a rigid last hired, first fired seniority system" in these circumstances. In so doing, the Court of Appeals clearly overstepped its authority under the Constitution and thereby abused its discretion in approving the 1981 modifications to the decree.[8]

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[7] As this Court reminded recently in *Northwest Airlines, Inc. v. Transport Workers Union of America, supra*, 451 U.S. at 95,

> . . . federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers . . . . [T]he federal lawmaking power is vested in the legislative, not the judicial branch of government; therefore, federal common law is "subject to the paramount authority of Congress." New Jersey v. New York, 283 U.S. 336, 348, 75 L.Ed. 1104, 51 S. Ct. 478.

In addition, the Court noted that:

> once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law. See, e.g., Illinois v. Milwaukee, supra, at 107, 31 L. Ed. 2d 712, 92 S. Ct. 1385; Arizona v. California, 373 U.S. 546, 565-566, 10 L. Ed. 2d 542, 82 S. Ct. 1468.

Id. at 95, fn. 34.

[8] Simply stated, the Court of Appeals' reliance on *Bakke (University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Weber (United Steelworkers of America v. Weber*, 443 U.S. 193 (1980)) both of which dealt with the legality of racial preferences

Plainly, the consent decree had as its objective a percentage increase in the number of minority employees in the Fire Department. The agreed-upon means for attaining this objective was through the hiring process—not through any program of seniority adjustment or firing of existing nonminority employees. The decree makes no reference to seniority at all. There being no such reference, the decree must be interpreted as placing no restrictions on treatment of minority applicants once hired into the workforce in the same manner as other employees.

The objectives of the consent decree have been and continue to be met. Entrance examinations have been changed, recruitment practices have been modified, and priority certification groups for minority applicants have been created that still exist and will continue to exist until agreed-upon quotas have been met.

It cannot be denied that the economic circumstances which brought about the need for layoffs in 1981 may have delayed that day when the agreed-upon quotas will be achieved. A temporary setback in the progress toward that goal has occurred. That delay however has not been occasioned by any attempt to circumvent the agreement clearly set forth in the decree. It has resulted from the neutral operation of a statutorily-protected seniority system.

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in voluntary affirmative action programs, misses the point. Were the terms of the initial consent decree under challenge, perhaps the considerations underlying *Bakke* and *Weber* would be germane. Here, however, the relief sought in the form of modification of the decree was wholly new to the terms of the compact and did not enjoy the blessing of both parties to the decree. The additional relief awarded by the District Court was in no sense voluntary and did not represent judicial approval of an agreement between the parties as was involved in *Weber*. It was rather, as conceded by the Court of Appeals, an effort to fill a gap overlooked by the respondents when the settlement was originally negotiated—"Nor do we think that plaintiffs should be penalized for failing, in negotiating the decrees, to have foreseen the unprecedented change in state and local fiscal policy resulting in the extensive layoff programs." Pet. App. A14-A15.

To permit the District Court to supersede the vested seniority rights protected by Section 703(h) is to undo the Constitutional balance by judicially enlarging upon explicit limitations imposed by Congress on the general remedial provisions in the Act.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
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BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner*,
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v.
PEDRO CASTRO, et al., *Respondents*.

NANCY B. BEECHER, et al., *Petitioners*,
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BOSTON CHAPTER, N.A.A.C.P., INC., et al., *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE FOR LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HISPANIC NATIONAL BAR ASSOCIATION, THE EQUAL JUSTICE FOUNDATION, INC., LATINO POLICE OFFICERS ASSOCIATION, LATINOS FOR AFFIRMATIVE ACTION, LOS ANGELES CITY EMPLOYEES CHICANO ASSOCIATION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Did the District Court Exceed Its Equitable Powers in Fashioning the Relief Ordered in the Judgment Below?

2. Is the Race-Conscious Relief Ordered by the District Court Constitutionally Permissible?

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Brown, Susan; Estrada, Carmen; Hill, Ann, The State of Hispanic America, "Hispanics & the Administration of Justice" (National Hispanic Center for Advanced Studies & Policy Analyses, 1981) 16

Equal Employment Opportunity Commission, Equal Employment Opportunity Report - 1978, Minorities and Women in State and Local Government (1980) 11

Equal Employment Opportunity Commission, Minorities and Women In State and Local Government, Vol. IV - Municipal Governments, Research Report No. 52-4 (1977) 11

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INTEREST OF AMICI CURIAE

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. For over 50 years LULAC has advocated equal employment opportunities for Hispanics and developed job opportunities for Hispanics through its activities.

The Hispanic National Bar Association is a national organization of lawyers of Hispanic heritage and other lawyers interested in the unique problems faced by Hispanics in the United States. For over ten years it has advocated for equal employment opportunities for Hispanics in professional and non-professional capacities. The Association has presented its views to the Courts of the United States regarding employment issues of vital importance to Hispanics.

The Equal Justice Foundation, Inc. is a national public interest organization with a membership of over one thousand lawyers and students. The organization's purpose is to improve citizen access to justice. The numerous

chapters throughout the United States create greater access for the underrepresented through legislative work and program development/implementation.

The Latino Police Officers Association is a statewide non-profit organization of Latinos employed in police work, parole, probation and law enforcement. With 12 chapters throughout the State of California, the association's activities includes the recruitment, maintenance and promotion of Latinos within law enforcement.

Latinos for Affirmative Action is a coalition of Hispanic organizations and individuals dedicated to pursuing equal employment opportunity in City and County of San Francisco jobs for Hispanics. L.A.A. has pursued administrative avenues to alter the selection and hiring process used by San Francisco in order to correct the historic and pervasive underrepresentation of the Hispanic population of San Francisco in the City's workforce.

The Los Angeles City Employees Chicano Association, Inc. (LACECA) is an

organization of Spanish surnamed city employees concerned with ethnic discrimination or systematic exclusion of Hispanics from municipal employment. Since 1971, LACECA has worked to advance the employment, educational, economic, and social welfare of its members and to promote and support affirmative action within the City of Los Angeles' workforce.

Each of the amici has deep concern that, as a result of strict application of seniority rules, retrenchment in municipal, county, and state workforces might undermine fragile and recently won gains in employment of Hispanics in governmental public service agencies. Such gains are critical to minority citizens who depend upon those agencies for public services.

QUESTIONS PRESENTED

1. Did the District Court Exceed Its Equitable Powers in Fashioning the Relief Ordered in the Judgment Below?

2. Is the Race-Conscious Relief Ordered by the District Court Constitutionally Permissible?

STATEMENT OF THE CASE

Amici rely upon Respondents to set out the factual setting of this case.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge that the decision below be affirmed. The broad power of the district court in fashioning relief in an employment discrimination case includes the use of factors other than strict seniority to effectuate layoffs where the overall goals of a consent decree will be undermined by seniority- based layoffs. Consequently, the Court correctly ordered affirmative action in the lay-off process to overcome the discrimination found to exist and to be remedied in the consent decree.

The first question presented in this case is whether the district court exceeded its equitable powers in fashioning the relief in this case. Amici agree with the district court, the First Circuit Court of Appeals, and Respondents herein, that federal courts have well recognized broad powers to fashion remedies to end discriminatory

conduct on the part of public entities, especially where a consent decree has already been entered in the case. Federal courts are under a duty to order relief which will not only prohibit future discriminatory conduct but also eradicate the present effects of past discrimination.

The second question presented herein is whether or not the race-conscious relief ordered by the district court is constitutionally permissible. Amici respectfully submit that federal courts have firmly established the use of race as a factor in fashioning and securing relief in discrimination cases. All counsel for parties in this case have consented to the filing of this brief amicus curiae.

ARGUMENT

I.
THE DISTRICT COURT DID NOT EXCEED ITS EQUITABLE POWERS IN FASHIONING THE RELIEF BELOW

A. Hispanics Have Been Significantly Underrepresented In Public Safety Agencies.

The First Circuit Court of Appeals, in its opinion below, characterized its decision as a balance of two competing rights, earned seniority versus racially representative police and fire departments. The Court emphasized the need for the public safety departments of a city to reflect its minority population in order to deliver effective service. The Court reasoned that "the public interest requires a racially balanced police force ... Unless the public safety departments reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982) (citation omitted).

Petitioners contend that the Court's justification that a racially balanced public safety department is necessary to provide effective services must be discredited because that justification accepts that public racial perceptions may dictate public agency staffing policies. (Brief for Petitioner Boston Firefighters Union, Local 718 at p. 12) However, the Court's decision was not based on the public's preference, but on the public interest in having racial diversity in police and fire protection forces.

In 1972, Congress recognized the impact that a pattern and practice of discrimination by an employer -- particularly a public employer -- may have on a class of persons. In recommending extension of Title VII to cover State and municipal employment, the Senate Labor Committee specifically cited statistical findings, revealing that "in the five Southwestern states with the highest concentration of Spanish-speaking Americans, their representation in the vital area of law enforcement is significantly

disproportionate to their demographic distribution." Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., p. 419 (1972).

It then said:

> This failure of State and local government agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone to good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates a mistrust, alienation, and all too often hostility toward the entire process of government.

Echoing similar sentiments, the House Committee on Education and Labor cited the same statistical findings and found:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all of the people equally is negated.
>
> This widespread discrimination is evidence that state and local government units have not instituted equal employment opportunity required by the national policy to eliminate discrimination in employment. Id. at 77.

The underrepresentation of Hispanics in the nation's municipal public safety agencies is severe and there has been minimal improvement since Title VII became applicable to public employers in 1972. As early as 1969 the U.S. Commission on Civil Rights stated, in their review of state and local government employers, that "[b]arriers

and obstacles to equal employment opportunity for minority group members were greater among uniformed policemen and firemen than in any other area of state and local government." 1/ The Commission found that "[i]n the protective services...Spanish Americans were employed as policemen and firemen in San Francisco, Oakland and Houston on the average less than half as frequently as Anglos." 2/

In 1974 Spanish-surnamed Americans were only 1.9% of the firefighters in the United States while whites comprised

1/ U.S. Commission on Civil Rights, For ALL the People, A Report on Equal Opportunity in State and Local Government Employment (1969), p. 71.

2/ Id. at p. 26-27. Hispanics were severely underemployed in the three municipalities surveyed when compared to their representation in the population in those areas:

Spanish American Population (%)

San Francisco	Oakland	Houston
7.0	6.5	6.8

Police force - Spanish Americans (%)

San Francisco	Oakland	Houston
1.2	0.6	6.4

Firefighter force-Spanish Americans (%)

San Francisco	Oakland	Houston
1.5	1.1	2.0

Id. at p. 25

93.5% of the total firefighter services. Similarly, Spanish-surnamed Americans were 2.5% of the nation's police forces as compared to whites' 88.9% share of the total force that same year. 3/ By 1978 the Hispanic representation in our nation's safety agencies had increased by less than 1%: Hispanics comprised 2.6% of the nation's firefighters (compared to whites' 91% representation) and 3.3% of the nation's municipal police forces (compared to 87% white representation). 4/ Hispanics have not achieved equitable representation in our nation's public safety agencies. The gains in Hispanic participation have been extremely slow and do not nearly reflect the increase in the Hispanic

3/ Equal Employment Opportunity Commission, Minorities and Women in State and Local Governments 1974, Vol. IV - Municipal Governments, Research Report No. 52-4 (1977) pp. 48, 59.

4/ Equal Employment Opportunity Commission, Equal Employment Opportunity Report - 1978, Minorities and Women in State and Local Government, (1980), pp. 381, 384.

population in the United States. [5/]

Because of shrinking governmental revenues and rising costs, many state and local employers are now, or soon will be, engaged in substantial reductions in workforce. If strict seniority -- "last hired, first fired"-- is followed in all cases, the layoff of police and fire protection personnel, when coupled with the comparatively recent hiring of Hispanics into these job categories, would have a devastating impact on the racial and ethnic integration of police and fire departments throughout the United States. If this impact is allowed to occur, many public agencies' workforces would return to the levels of minority participation that existed in the early 1970s, at the end of decades of overt discrimination and benign neglect.

5/ The nation's Hispanic population increased to 14.6 million in 1980 and now accounts for 6.4 percent of the population, up from 4.5 percent in 1970. U.S. Bureau of the Census, 1982.

1. There Is A Need For Hispanics To Serve In Public Service Agencies To Ensure Equitable Provision Of Services To Minorities.

It has been long recognized that an integrated work force results in improved public service. In a 1969 report on equal employment opportunity in state and local government the U.S. Commission on Civil Rights concluded:

> The civil servant performs government's routine chores and housekeeping duties and makes the many policy and administrative decisions which have a concrete and often immediate effect on the lives of the people living within the particular jurisdiction. If these decisions are to be responsive to the needs and desires of the people, then it is essential that those making them be truly representative of all segments of the population. 6/

6/ U.S. Commission on Civil Rights, For ALL the People, A Report on Equal Opportunity in State and Local Government Employment (1969), p. 131.

In Confronting Racial Isolation in Miami (1982), the Commission maintained its position that "[a] representative [police] force enjoys improved relations with its community, gains its respect and trust and consequently functions more effectively." 7/

7/ Id. at 334. See also, U.S. Commission on Civil Rights, Who is Guarding the Guardians: A Report on Police Practices (1981), p. 5; Police Practices and the Preservation of Civil Rights (1980), pp. 10-11; Mexican Americans and the Administration of Justice in the Southwest (1970), p. 17; Law Enforcement: A Report on Equal Protection in the South (1965), p. 93; Alabama Advisory Committee, Where Are Women and Blacks? Patterns of Employment in Alabama Government (1979), p. 17; Kansas Advisory Committee, Police-Community Relations in the City of Wichita and Sedgwick County (1980), p. 69; Washington Advisory Committee, Equal Employment Opportunity in Tacoma Area Local Government (1980), p. 40; Florida Advisory Committee, Toward Police/Community Detente in Jacksonville, (1975), p. 10; Florida Advisory Committee, Police by the White Male Minority (1976), pp. 72-73; South Dakota Advisory Committee, Liberty and Justice for All (1977), p. 37; Tennessee Advisory Committee, Civic Crisis -- Civic Challenge: Police Community Relations in Memphis (1978), p. 27; Florida Advisory Committee, The Administration of Justice in Pensacola and Escambia County, (1981), p. 17.

Several courts have relied on the community-wide benefits of an integrated police force to justify race-conscious relief. In Detroit Police Officers Ass'n v. Young, 608 F. 2d 671, 696 (6th Cir. 1979), cert. denied 452 U.S. 938 (1980) the Sixth Circuit explained:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is ... on the public's perception of law enforcement officials and institutions.

See also Talbert v. City of Richmond, 648 F. 2d 925, 931 (4th Cir. 1981).

Moreover, in the case of the Hispanic community there is an urgent need for bilingual police and firefighters. The vast majority of Hispanics in this country are Spanish-

speaking. 8/ The Spanish language is critical to the overwhelming majority of Hispanics in the United States as a primary means of communication. Spanish language ability is crucial if police or firefighters are to communicate in an emergency situation with members of the Hispanic community. The exclusion of Hispanics from our public service agencies has resulted in unequal services to the Hispanic community. 9/

8/ A 1978 Bureau of Census report indicates that only 14.3% of Hispanics in the United States have an English language background. U.S. Department of Commerce, Bureau of the Census, Persons of Spanish Origin in the United States: March, 1978, Current Population Reports, Series P-20, No. 339, 1979. Spanish is the first language for most Hispanics in the United States.

9/ Brown, Susan; Estrada, Carmen; Hill, Ann, The State of Hispanic America, "Hispanics & the Administration of Justice" (National Hispanic Center for Advanced Studies & Policy Analyses, 1981), pp. 98, 100, 101.

B. The Courts Have Broad Equitable Powers To Fashion Remedies To Correct Pervasive Discrimination In Employment In The Public Sector.

1. Equity Permits Courts Flexibility In Formulating Relief To Correct Constitutional And Statutory Violations.

It is an unassailable principle of federal adjudication that federal courts have broad equitable powers to fashion remedies to correct constitutional or civil rights violations. See generally, Brown v. Board of Education, 349 U.S. 294, 300 (1955); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); Albemarle Paper Company v. Moody, 422 U.S. 405, 417-418 (1975); Hills v. Gautreaux, 425 U.S. 284, 294-295 (1976). In exercising this power, courts have the duty not only to terminate ongoing practices of discrimination, but also to eliminate the effects of past discrimination. Louisiana v United States, 380 U.S. 145, 154 (1965).

The breadth of equity power of federal courts is exemplified by the relief ordered and affirmed in a variety of cases involving constitutional and

statutory violations. In Hutto v. Finney, 437 U.S. 688-689 (1978) this Court affirmed the actions of the district court which had issued an order that placed limits on the number of men that could be confined in a single prison cell, required that each cell have a bunk, and set 30-day limits on "isolation" sentences. The remedy fashioned by the district court was upheld even though it intruded on the conduct and administration of prison affairs by prison officials. Cf. Procunier v. Martinez, 416 U.S. 396, 404-405 (1974).

Similarly, in Newman v. State of Alabama, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), the Fifth Circuit upheld an order of the district court which required extensive reorganization and upgrading of medical care provided in the Alabama state prison system. Newman v. Alabama, supra, 503 F.2d at 1325. In Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) a lower court order requiring the implementation of a detailed set of standards for the provision of treatment

and rehabilitation at three state facilities for the mentally handicapped was upheld.

Federal courts have also ordered broad relief in cases involving conditions of confinement and constitutional rights in the field of institutions for the detention of juveniles. Velson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973), aff'd 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

In each of the cases detailed above the Court of Appeals or this Court upheld the relief ordered by the district court -- relief far more intrusive than that in the case at bar -- despite challenges by the respective government officials that the orders in question intruded into areas traditionally within the decision-making sphere of State and local officials. However, in each instance the appellate courts found that the constitutional violations required correction and that the courts possessed the authority to order relief which would in fact correct the violation found to exist.

More directly related to the instant case are decisions by this Court affirming the exercise of equity powers to remedy racial discrimination. The broad scope of a district court's discretion in fashioning a remedy in a voting rights case has been upheld this Term in City of Port Arthur v. United-States, ___ U.S. ___, 51 U.S.L.W. 4033 (1983). City of Port Arthur, supra, was a Section 5 suit seeking approval of changes in the voting scheme for election of the city council and the office of mayor. The District Court disapproved the plan submitted by the City, and approved by the Attorney General, on the basis that annexation of a predominantly white unincorporated area, coupled with expansion of the city council, would impermissibly dilute the voting strength of the Black minority population of the City. The District Court imposed its own plan. Thereafter the City appealed. In upholding the action of the district court, this Court held that deference should be paid to the district court, which was sitting in equity and which was seeking to remedy a situation which

would constitute a violation of law. City of Port Arthur v. United States, supra, 51 U.S.L.W. at 4035.

Earlier, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), this Court affirmed a wide-ranging plan for desegregating the public schools of Charlotte and surrounding Mecklenburg County, North Carolina. Premised on the landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), declaring racially segregated schools unconstitutional, the Swann decision upheld a plan altering school attendance zones, instituting a transfer program and requiring transportation to support it, and requiring busing of students toward the goal of creating a "unitary system in which racial discrimination would be eliminated root and branch." Swann v. Charlotte-Mecklenburg, supra, at 15, citing Green v. County School Board, 391 U.S. 430, 437-438 (1968). See also generally, Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Griffin v. County School Board, 377 U.S. 218 (1964). This Court has also held

that a metropolitan remedy is not impermissible as a matter of law to correct governmental action resulting in racial housing discrimination. Hills v. Gautreaux, 425 U.S. 284, 306 (1976).

This Court's approval of relief designed to end race and national origin discrimination has not been limited to discrimination in voting, education or housing. This Court's decisions have upheld the power of district courts to award back pay, Albemarle Paper Company v. Moody, 422 U.S. 405, 417-418 (1975) and constructive seniority, Franks v. Bowman, 424 U.S. 747 (1976) to correct employment discrimination. Additionally, numerous Appeals courts have considered and approved the use of accelerated hiring goals to eradicate the effects of past employment discrimination. 10/

10/ Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974)(Title VII); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F. 2d 871 (6th Cir. 1974)(Title VII); Franks v. Bowman Transp. Co., 495 F. 2d 398 (5th Cir. 1974), modified, 424 U.S. 747 (1976) (Title VII); Morrow v. Crisler, 491 F. 2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974)(§1983); Vulcan Society v. Civil Ser. Comm'n, 490

The relief ordered and approved in the cases cited and discussed above is consistent with the flexibility inherent in the invocation and exercise of the equity powers of federal courts. As was stated in Hecht v. Bowles, 321 U.S. 321 (1944):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and

10/ (continued)
F. 2d 387 (2nd Cir. 1973)(§1983); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F. 2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974) (Title VII); Bridgeport Guardians, Inc., v. Civil Serv. Comm'n, 482 F. 2d 1333 (2nd Cir. 1973)(§§ 1981, 1983); United States v. N.L. Indus., Inc, 479 F. 2d 354 (8th Cir. 1973) (en banc)(§ 1983); Pennsylvania v. O'Neill, 473 F. 2d 1029 (3rd Cir. 1973) (en banc)(§ 1983); United States v. Local 212, IBEW, 472 F. 2d 634 (6th Cir. 1973)(Title VII); United States v. Wood Lathers Local 46, 471 F. 2d 408 (2nd Cir.), cert. denied, 412 U.S. 939 (1973)(Title VII); United States v. Carpenters Local 169, 457 F. 2d 210 (7th Cir.), cert. denied, 409 U.S. 851, (1972)(Title VII); Carter v. Gallagher, 452 F. 2d 315 (8th Cir.

> practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-330.

Petitioners in the instant case seek to deprive the courts, in the important context of seniority-based layoffs, of any discretion to utilize equity's breadth and flexibility to adjust the public interest, private needs, and competing private claims.

Concomitant with the broad powers granted to federal courts is the duty in cases involving racial

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10/ (continued)
1971) (en banc), cert. denied, 406 U.S. 950, (1972)(§ 1983); United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971)(Title VII); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971)(Title VII); United States v. Local 38, IBEW, 428 F. 2d 144 (6th Cir.), cert. denied, 400 U.S. 943, (1970)(Title VII); Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969)(Title VII).

discrimination to exercise that power in such a way as to eliminate the discrimination found to exist. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Hills v. Gautreaux, 425 U.S. 284, 294-295 (1976).

As has been stated by this Court:

> [W]here racial discrimination is concerned, the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. (emphasis added) Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), citing Louisiana v. United States, 380 U.S. 145, 154 (1965).

This district court understood this responsibility and fashioned a remedy which was designed to bar future discrimination in the police and firefighter positions, as well as to correct the historic racial imbalance that had existed in the job categories.

C. The Remedy Proposed by The District Court And Affirmed By The Court Of Appeals Is A Narrowly Drawn Program To Ensure Attainment Of An Important And Permissible Goal: The Need to Protect Remedial Orders Designed To Grant Relief From Past Discrimination.

The district court's order in this case was necessary to protect the court's pre-existing orders desegregating the public safety departments. After proof of illegal discrimination, federal courts have the authority to order complete relief as discussed above. The district court sought to eliminate the discriminatory effects of the past as well as bar like discrimination in the future through the orders challenged here. The orders were proposed following judicial findings of illegal discrimination and sought to eliminate discrimination by mandating hiring goals and ratios. Castro v. Beecher, 459 F.2d at 736-37, n. 15. Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026-1027 (1st Cir. 1974). Those orders are totally consonant

with decisions in virtually every Circuit Court of Appeals requiring hiring goals and affirmative action to remedy employment discrimination. Confronted by a reduction in force that would have destroyed past progress under its decrees and would cripple future efforts to achieve the desired objectives, both the district and the Court of Appeals recognized the need to protect the original decrees through modification of the planned layoff system.

This case does not involve the adoption or application of seniority systems that do not have their origin in intentional discrimination and are therefore protected by § 703(h) of Title VII. Had Hispanic and Black police and firefighters sued for suspension of the layoff plan in an independent court action, they most likely would have lost. International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). However,

Section 703(h) does not limit the equitable powers of the courts to extend remedial relief under Section 706(j) of the Act, once discrimination has been found. Franks v. Bowman Transportation Co., 424 U.S. 747, 758 (1976). This case involves the district court's use of these equitable powers and not the issue of seniority discrimination. The district court issued a narrow, limited decree designed to protect the status quo of existing court orders.

The interests that were balanced by the district court -- elimination of the effects of past discrimination versus forced reductions in the workforces -- are not unique to this case. There are literally hundreds of judgments, consent decrees, or litigation induced affirmative action plans that would be undone by seniority based layoffs. To rule for petitioners in this case would deprive federal courts of the

equitable power to preserve remedies in appropriate cases, or indeed to consider any factors other than seniority. Such a ruling would cripple voluntary efforts by employers to negotiate or devise layoff plans based on factors other than, or in addition to, seniority, in order to meet permissible goals such as insuring minority access to public services or preserving minority employment in traditionally segregated job categories. Cf. United Steelworkers ofAmerica v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

II.
THE RACE CONSCIOUS RELIEF ORDERED BY THE DISTRICT COURT IS CONSTITUTIONALLY PERMISSIBLE

The original relief ordered by the court below is a race conscious program designed to ensure that historic discrimination in the Boston Fire and Police Departments is ended. The

supplemental order of the district court that is the basis of the instant appeal is likewise a race conscious plan designed to ensure that the progress made toward eliminating the effects of past discrimination is preserved. The order of the district court conforms to, and is consistent with, earlier decisions of this Court which have validated the consideration of race in local public works project contracting, Fullilove v. Klutznick, 448 U.S. 448 (1980); graduate school admissions, Regents of the University of California v. Bakke, 438 U.S. 265 (1978); affirmative action job training programs, United Steelworkers of America, v. Weber, 443 U.S. 193 (1979); and decennial reapportionment, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

This Court's decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979),

is most pertinent to the instant case. In Weber this Court found that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended, does not bar voluntary, private affirmative action undertaken by an employer in collaboration with an employee organization. The significance of the Weber case is that, similar to the relief ordered by the district court below, the affirmative action plan in Weber was part of a program that included a preference for Blacks for a specific number of slots in a job training program and was directed toward ending "conspicuous racial imbalance in traditionally segregated job categories." United Steelworkers of America v. Weber, supra, at 208-209. By analogy the relief ordered by the court below mandates the use of race as a criterion for a percentage of the positions in the Boston Police and Fire Departments toward the end of

ensuring that racial imbalances in historically segregated job categories, found to be the product of discrimination, did not continue or increase.

The arguments in favor of the relief ordered by the court below are stronger than for the program approved in Weber. In the instant case there had been a finding by the district court and upheld by the Court of Appeals that discrimination was a part of the selection process for positions with both the Police and Fire Departments. 11/ The previous findings of discrimination provide a solid basis for the affirmative relief ordered by the district court. Cf. Fullilove v. Klutznick 448 U.S. 448, 455 (1980); Detroit

11/ Boston Chapter, NAACP v. Beecher, 479 F.2d 967-969 citing, Castro v. Beecher, 334 F.Supp. 930, 934, (D. Mass. 1971), aff'd; Castro v. Beecher, 459 F.2d 725, 730-31, 737-738 (1st Cir. 1972); Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507, 510, 514, 517, 519-20; aff'd, 504 F.2d 1017 (1st Cir. 1974).

Police Officers Ass'n v. Young, 608 F.2d at 689; Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981). See also Franks v. Bowman, 424 U.S. 747 (1976); International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Additionally, the relief ordered by the district court is consistent with the Weber decision because it is not an absolute bar to the advancement within the Police and Fire Departments by white officers. Weber, supra, at 208. The lower court's order in this case did not require that the proportion of minority police and fire officers be consistent with the minority representation in the general population. Rather, the order left the proportion of Black and Hispanic police and fire officers substantially below the representation of Blacks and Hispanics in the Boston area. The order did not prohibit the layoff of any minority personnel; in fact, under the

modified reduction in force plan, 13% of those laid off were Black or Hispanic police and fire officers. Boston Chapter, NAACP, supra, 679 F.2d at 977, n. 14. The modification ordered by the district court was a plan to ensure that effects of unlawful employment discrimination would not be allowed to reassert themselves. The plan was a reasoned response to a problem of serious consequence to the Boston community and was designed within the limits of the Constitution to ensure that the problem was dealt with in as effective and fair a manner as possible given the competing interests involved.

The position taken by the Solicitor General, in his brief amicus curiae in support of petitioners, that constructive seniority relief is available only to identified victims of impermissible discrimination limits too narrowly the powers of federal courts and this Court's ruling in Franks v. Bowman, supra. Such a limitation

would effectively deny relief to all individuals in this case and other employment discrimination cases where identification of victims is made difficult or impossible by passage of time, loss or destruction of records, or other reasons not within the control of persons subjected to discrimination. In circumstances where there is a long history of discrimination by an employer, large numbers of individuals who are qualified for employment never apply for jobs where they know it would be a futile effort. These individuals, although not identifiable, are nevertheless clear victims of a pattern of discrimination such as that which existed in the Boston Police and Fire Departments. The denial of relief to all but the very limited class of persons identified in Franks v. Bowman would make relief under Title VII illusionary, in contravention of the underlying purpose of the statute.

III.

CONCLUSION

For the foregoing reasons, the opinion of the First Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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Nos. 82-185, 82-246, 82-259

IN THE

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On Writs of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR ROBERT LIPSHUTZ, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a court modify a seniority statute on layoffs in order to preserve progress under a court-ordered affirmative action program, when unforeseen circumstances develop, and literal application of the statute would undo that progress?

2. Should a court direct the parties first to explore all alternatives to lay-off, including those which would have added financial burdens to the municipality, before resolving the conflict between the seniority statute and the affirmative action order?

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Subcommittee on Labor of the Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. (1979) 15, 17
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Miscellaneous

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---

BRIEF FOR ROBERT LIPSHUTZ, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

Amici Robert Lipshutz, Herman Schwartz, Herbert Hershfang, Daniel Levenson and Kenneth Sweder, et al., are American Jews who believe in the preservation of the constitutional and legal rights of all Americans. They are active in Jewish organizations with similar goals.[1]

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[1] The *Amici* are: Robert Lipshutz, formerly Counsel to President Jimmy Carter, Co-Chairman, Commission on Law and Social

The issues raised by this case are momentous for the future of equal justice in America. Because *Amici* believe it vital that American Jews speak out to help avoid the undermining by fiscal austerity measures of the modest progress achieved in eradicating employment discrimination, *Amici* have taken the unusual step of filing a brief in their own names.

STATEMENT OF THE CASE

The judgment on appeal is from a consolidation of two separate cases against the Boston Police Commission and Boston Fire Commissioner. The City officials have not appealed from the order at issue; the petitioners are the police and fire-fighter unions, who are intervenor-defendants, and the State of Massachusetts.

1. The Police Department Case.

In 1970, black and Hispanic applicants for employment with the police department challenged the recruitment and certification priorities of the Boston Police Department as violative of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. They neither alleged nor tried to prove intentional discrimination because as the district court noted, "all parties recognize and the court holds that . . . plaintiffs need neither allege nor prove that defendants acted with intent or motive to discriminate." *Castro v. Beecher*, 334 F. Supp. 930, 935 n.1 (D. Mass. 1971).

Action, American Jewish Congress; Herman Schwartz, Member, Commission on Law and Social Action, American Jewish Congress; Herbert H. Hershfang, Esq., Chairman, Commission on Law and Social Action, New England Region American Jewish Congress, Past President, New England Region, American Jewish Congress; Daniel D. Levenson, Esq., Past President, New England Region, American Jewish Congress; Kenneth H. Sweder, Esq., President, New England Region, American Jewish Congress; David B. Cohen, Esq., State Representative, Commonwealth of Massachusetts; Sharon Goldzweig, Esq.; Frederick Mandel, Esq. Organizational affiliations are listed for identification only.

At this time, there were only 65 blacks out of 2805 Boston police officers—3.6% of the police force—even though blacks accounted for 16.3% of Boston's population. After a bench trial, the district court found that the 1968-70 examinations were discriminatory and not job related. *Castro v. Beecher*, 334 F.Supp. 930 (D.Mass. 1971). Upon remand from the Court of Appeals, 459 F.2d 725, 737 (1st Cir. 1972), the district court approved a consent decree giving certain black and Hispanic applicants a competitive advantage, and ordering the implementation of affirmative action programs aimed at this group.

A further consent decree was entered and supplemented on July 7, 1975 (with further supplementation on July 13, 1976 and June 1, 1975) mandating, *inter alia*, measures designed to facilitate the appointment of one minority police officer for each white until the force achieved a "complement of minorities commensurate with the percentage of minorities within the community."

Pursuant to these decrees, between 1974 and 1980, the Boston Police Department hired 492 officers, of whom 213 (43%) were minority, so that as of July 6, 1981, minority representation on the police force had risen to 11.7%.[2]

2. The Fire Department Case.

Unsuccessful minority applicants for firefighter positions and the Boston NAACP sued the Fire Commissioner in 1972 under 42 U.S.C. §§ 1981 and 1983; the Attorney General sued in 1973 under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, raising similar claims and the cases were consolidated. The district court found that while the combined minority population of Boston was 23%, blacks and Hispanics represented only 0.9% of the fire depart-

[2] By 1980, the minority population of Boston had increased to almost 30% of the general population.

ment's sworn personnel. *Boston Chapter NAACP, Inc. v. Beecher*, 371 F.Supp. 507 (D.Mass. 1974). The court ruled further that the 1968-1971 examinations were discriminatory, as was the word-of-mouth recruitment policy. It ordered "affirmative relief to remedy the present effects of past discrimination," which included active recruitment of minority firefighters, and priority certification groups for minority applicants. This relief was to remain in effect until parity was achieved between representation of minorities in the department and in the community at large. The Court of Appeals approved the decree as necessary "to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities." 504 F.2d 1017, 1027 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Further implementing orders were entered. Between 1974 and 1981, the court's decrees resulted in an increase of minority representation on the fire department to 14.7%, as the Department hired 248 minority firefighters out of 553 new sworn personnel.

3. Proposition 2½ and Its Consequences.

In the Spring of 1981, budgetary restrictions were imposed on the police and fire departments as a result of the passage of Proposition 2½, a tax limitation measure. The police and fire departments initiated reduction-in-force programs pursuant to the Massachusetts civil service and veterans preference statutes, Mass. Ann. Laws ch. 31, § 39; ch. 30 9A (1979), which require separation from service to be in reverse order of seniority except for veterans. Because the orders requiring minority hiring had been so recently entered, most of the officers to be laid off were to be minority: 122 of 252 police officers—48%—slated for lay-off were minority and 113 of 207 firefighters (54.6%). As a result of these firings, the minority representation on the police force would have dropped from 11% to 6.2%, and in the fire department from 14.7% to 9.1%.

Respondents thereupon moved pursuant to Fed.R.Civ.P. 60(b) to modify the existing decree, and the petitioner-unions were allowed to intervene as parties defendant.

4. The Decisions Below.

In an opinion and order dated August 7, 1981, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters' enacting Proposition 2½ amount to 'new and unforeseen conditions . . .,'" and that "'if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.'" Pet. for Cert. in 82-246 12a. It noted further that to allow the lay-offs to occur as planned would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and firefighters, and would produce a "grievous wrong." *Ibid.*

To avoid these results, the Boston Police Commissioner and Fire Commissioner were enjoined from reducing, "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the program. *Id.* at 2a-3a.

The Court of Appeals affirmed the orders of the district court, finding that the district court had the power to revise the consent decree, that neither the Massachusetts seniority statute nor this Court's seniority decisions barred the relief ordered by the district court, and that such relief was constitutional.

The court's order and Proposition 2½ resulted in the lay-off of 258 police officers and 257 firefighters. The

lay-off was only temporary, however, because in June 1982, Massachusetts enacted legislation providing new revenues for Boston and requiring the recall of all laid-off police and firefighters. By July 1, 1982, all personnel available for recall were reinstated.[3]

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should suffer most from lay-offs resulting from the passage in Massachusetts of a tax limitation and expenditure measure, commonly called Proposition 2½. On the one hand, laying off minority workers hired in increased numbers under a court-ordered affirmative action program is inconsistent with a national commitment of the highest order to eradicate all vestiges of discrimination. On the other hand, laying off employees out of the sequence required by the bona fide seniority provisions embodied in Massachusetts civil service statutes and protected against challenge by Title VII is inconsistent with the senior employees' federally and state protected rights, the preservation of which also reflects a strong public commitment.

Upon the assumption that the court was required to resolve the stark conflict between these competing values, the court modified the state seniority requirements and incorporated an affirmative action component into the statute.

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[3] Police officers who were either laid off or demoted on November 10, 1981, ostensibly because of budgetary cutbacks, appealed to the Massachusetts Civil Service Commission ("The Commission") pursuant to the provisions of Mass. Ann. Laws Ch. 31 § 43 (1979). On January 20, 1983, the Commission voted to adopt the findings of fact of a hearing examiner, which included the determination that "the appointing authority had $1,129,714 available to it which it could have used to offset layoffs and demotions." The Commission concluded that the appointing authority had acted in bad faith and was ". . . utilizing Proposition 2½ as a cover for actions which were not motivated by reasons of economy at all." This administrative decision is subject to further judicial review. A copy of the opinion is being filed herewith as an Appendix.

Given the court's assumption, and as we argue below, its decision can be justified as a matter of law. Rigid seniority must be modified to allow the primary objective of the eradication of discrimination to proceed, and if that were all to the case, the decision below should be affirmed.

But the resolution of the conflict here may not have been necessary. The record does not show that either party advanced any alternative to avoid the conflict between seniority and preservation of the court's decree. For its part, the Court does not seem to have imposed upon the parties the obligation of devising and exploring such alternatives nor did it determine on its own whether less painful and more equitable alternatives were available. Thus, for example, work-sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational lay-offs, attrition plans, etc., should have been explored by the parties and the court.

Because it does not appear that these alternatives were fully explored, the courts below may have unnecessarily decided the question presented to this Court for review. This very difficult issue is thus not really ripe for decision, and the writ should be dismissed as improvidently granted. If, however, the Court believes it should decide the question, the decision below should be affirmed.

ARGUMENT

Introduction

Amici believe that the orders appealed from are within the equitable discretion of the Court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, nor the Constitution. The type of remedy at issue here is within the district court's discretion, for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." *Franks v. Bowman*, 424 U.S. 747, 763 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

However, we believe that the court may have acted precipitously. The remedy ordered by the district court is on its surface destructive of valuable security interests. As will appear below, however, the collision might have been avoided by the Massachusetts officials charged in the first instance with care for the competing rights in question. The district courts faced with the problems presented here should, if at all possible, consider alternatives that are less painful, yet substantially preserve whatever progress was made under an initial decree that is still operative. Certain of these alternatives are explored below. However, if the alternatives are not feasible, then a modification of the kind adopted here is appropriate.

Normally, a remand to consider these alternatives would be in order. Here, however, all of the laid-off workers have already been reinstated and there is thus no reason to remand for consideration of alternatives. The order appealed from should therefore be affirmed or the writ dismissed as improvidently granted.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable Principles Permit Overriding The Literal Application of the Seniority Statute.

The district court in this case confronted one of the most troubling dilemmas facing our society today: how to distribute the pains of fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of nonminority groups.

Recession and unemployment hurt many people, but minorities suffer the most. Because our nation has only recently undertaken to redress the centuries of segregation and discrimination, minorities have the shortest length of service, and when fiscal strains force cutbacks, they are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, *Last Hired, First Fired: Lay-Offs and Civil Rights* 36 (1977).[4]

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[4] The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devastating effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into

If unemployment remains high, and the "last hired, first fired" approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects, will be undone. See *id.* at 60-61.

There may be no painless options, however, and in the end someone will probably have to pay a price. Even if conventional seniority governs and older white workers keep their jobs,[8] the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group will suffer the most from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Certain basic principles govern, however:

(1) The eradication of discrimination and "the discriminatory effects of the past," *Albemarle Paper v. Moody*, 422 U.S. at 418 is the "primary objective" of Title VII, *Franks v. Bowman*, 424 U.S. at 768 n.28, and represents a national commitment of the "highest priority." *Id.* at 763.

(2) District courts are empowered under § 706(g) with "wide discretion . . . to fashion the most complete relief possible," *Franks v. Bowman*, 424 U.S. at 785; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324,

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place as a permanent, expendable economic and social underclass.

* * * *

In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

Last Hired, First Fired 60-61, 25-26.

[8] Some senior workers will still lose their jobs because of the veterans and perhaps other preferences under Mass. Ann. L. ch. 30, § 9A (1979). See Sol. Gen. Br. 8 n.7 and p. 13 *infra*.

361 n.47, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." *Franks v. Bowman*, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote its purposes. *United States v. United Shoe Corp.*, 391 U.S. 244 (1968); *United States v. Swift*, 286 U.S. 106, 119 (1932); *cf. Wright v. City of Emporia*, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, *Franks v. Bowman*, 424 U.S. at 778-79, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), and it is frequently overridden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks v. Bowman*, 424 U.S. at 778. In this very case, for example, seniority is not the dominant determinant with respect to lay-offs—the veterans preference created by Mass. Ann. L. ch. 30, § 9A, takes precedence, and this has significantly affected who was laid off.[6]

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[6] It appears that because of two large hiring waves in 1977-78 and 1979-80, a potential layoff of 252 police officers would normally mean at most a variance of only about two years or so between the most junior minority retained and the most senior nonminority laid off, if seniority were the only facotr. The reason that the layoffs reached 19 white officers hired in 1970 is because of the Massachusetts statutory *veterans* preference. See Joint App. 90a; Sol. Gen. Br. 8 n.7. In the firefighters situation, there may be only about a one-year difference between the most senior nonminority fired and the most junior minority retained. Pet. for Cert. in No. 82-185 7. These specific factual details are another reason why these matters should be left to the district court's discretion.

And the veterans preference is quite common. *Franks v. Bowman*, 424 U.S. at 778; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (agreement on veterans preference). Overcoming the effects of racial discrimination has also justified an override of seniority expectations, *Franks*, 424 U.S. at 779, either through "constructive seniority" as in *Franks*, or by agreement. *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979); *Savannah Printing Specialties v. Union Camp Corp.*, 350 F. Supp. 632 (S.D. Ga., 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is compiled, and more,[7] that modifying a particular system to prevent reversal of some modest gains for a congressional policy of the "highest priority," seems well within a court's equity discretion. A statute or a voluntary union-employer agreement could so modify it. *United Steelworkers v. Weber, supra; Tangren v. Wackenhut*, 480 F. Supp. 539 (D. Nev. 1979); *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1771 (1982); *Savannah Printing Specialties v. Union Camp Corp., supra.* In the cases at bar, both the district and appellate courts—who have lived closely with these cases for over a decade—noted that if they and the parties had foreseen that the decree might be undercut by recession-induced layoffs, the order would have initially provided for the kind of seniority modification ordered by the district court in 1981. Jt. App. 28, 25.

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[7] See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv.L.Rev. 1532, 1534 (1962); *Amer. Tobacco Co. v. Patterson*, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); *Calif. Brewers Ass'n v. Bryant*, 444 U.S. 598, 606-08 (1980).

Of course, seniority should not be lightly overridden. As the cases cited by petitioners indicate,[8] seniority has a very high value. But as earlier noted, if the modification is set aside, more junior minority employees will be laid off, and except for seniority, there is no particular reason for imposing the burden on them—all are equally innocent and all will suffer from the layoff.

Petitioners and certain Amici try to make something of the fact that the lower courts found no evidence of purposeful discrimination. But as the district court stressed in the very first reported decision in the police case, plaintiffs did not even allege or try to prove a discriminatory purpose because "all parties recognize and the court holds that . . . plaintiffs need neither allege nor prove that defendants acted with intent or motive to discriminate." *Castro v. Beecher*, 334 F. Supp. 930, 935 n.1 (D. Mass. 1971). The Court of Appeals below suggested that had such a finding been necessary, "it is by no means clear that our decisions in the police and fire cases should have been different." Pet. for Cert. in No. 82-246 26a. In any event, the cases are here as instances of proven discrimination under the appropriate contemporary standards and should be adjudicated as such.

B. Section 703(h) Does Not Bar the District Court's Modification.

Petitioners assert that under *Int'l Brotherhood of Teamsters v. United States*, *supra*, § 703(h) bars the relief below. That assertion misconstrues the *Teamsters* decision. Although a concern for seniority bears on the appropriateness of any equitable relief that might be inconsistent with an applicable seniority system, both *Teamsters* and *Franks v. Bowman* establish that § 703(h)

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[8] The cases are distinguishable, however. For example, in *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982) (the danger was that seniority would be adversely affected *before* discrimination was proven; here, it is already proven.

only *defines* an illegal discriminatory practice and does not prevent a modification of seniority to provide "relief otherwise appropriate" to remedy an illegal discriminatory practice. *Franks v. Bowman*, 424 U.S. at 761-62; *Teamsters*, 431 U.S. at 346-47.

The Solicitor General argues further that the remedial portion of *Teamsters* precludes the relief ordered here, and that *Teamsters* and *Franks* restrict Title VII remedies to make-whole relief to those individuals who can prove they were actually discriminated against. Sol. Gen. Br. 15-19.

These cases establish no such limitation for they deal exclusively with the situation where the only persons seeking a remedy are those who claim—either as named individuals or as class members—to have been victimized by discrimination. These cases do not deal with affirmative action remedies where the claims and remedial rationales are quite different—to bring minorities into the mainstream of the society by "open[ing] employment opportunities for Negroes in occupations which have been traditionally closed to them." *United Steelworkers v. Weber*, 443 U.S. at 208. The Court's refusal in *Teamsters* to grant relief to those who could not prove discrimination is simply an insistence that those individuals who claim to be victims of past discrimination, must prove it before they can get compensatory relief. That refusal implies nothing as to whether affirmative action remedies may not also be available for a group in the future, remedies that will necessarily benefit those who were not victimized by the discriminatory practice.

To put it differently, these cases establish the *legitimacy* of make-whole relief, but not its *exclusivity*. Otherwise, it is difficult to understand how at least three members of the *Teamsters* majority could either write or join in opinions the very next year in the *Bakke* case which explicitly approved affirmative action remedies in Title VII cases without even mentioning *Teamsters*. See *Re-*

gents of the University of California v. Bakke, 438 U.S. 265, 301-02 (1978) (Powell, J.); *id.* at 366 (Blackmun and White, JJ.). See also *Fullilove v. Klutznick*, 448 U.S. 448, 510-11, 513 (1980) (Powell, J.).[9]

C. Section 706(g) Does Not Bar the District Court's Modification.

Petitioners and Amici AFL-CIO and the Solicitor General invoke the last sentence of § 706(g) to contend that a court may order relief only for individual identifiable victims of the discriminatory practice. The AFL-CIO argues further that not only does that provision render the modification at bar illegal, but the original numerical ratio decrees as well.

The contention in either its limited or its sweeping form is contrary to the plain meaning of the section, the legislative history, and the assumptions and actions of this Court; if adopted, it would cripple Title VII enforcement.

The legislative history on this point is clear. As the Joint Explanatory Statement of Managers at the Conference on H.R. 1746 makes clear, the section—which was only declaratory of existing law—simply reiterates that a Title VII remedy is available to a court only for cases of "unlawful employment practices under Title VII." See Subcommittee on Labor of the Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. 1839 ("1972 Leg. Hist."). The section implies nothing about the very special situation of how a court preserves a decree already entered after a finding of discrimina-

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[9] Though dissenting on the merits, Justices Marshall and Brennan concurred generally in the remedial aspects of *Teamsters* relied on by the Solicitor General. 431 U.S. at 377, n.1 (Marshall, J., concurring and dissenting), and yet the following year in *Bakke* they also expressed their support for affirmative action decrees in a Title VII context without seeing any apparent consistency. See 438 U.S. at 366-68.

tion. As the Third Circuit put it, "The sentence merely preserves the employer's defense that the non-hire, discharge, or non-promotion, was for a cause other than discrimination." *Equal Employment Opportunity Commission v. AT&T*, 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). The last sentence of § 706(g) thus imposes no limitation on the remedy, once discrimination is found.

The Solicitor General's and AFL-CIO argument also minimizes the significance of the 1972 addition to the first sentence of § 706(g). In the 1964 Act, Congress provided that once discrimination is found, a court could order "such affirmative action as may be appropriate." In 1972, however, the Congress added language which allowed a court to go beyond the remedies specified, and concluded the sentence with the sweeping addition "or *any other relief* as the court deems appropriate." (emphasis added)

The AFL-CIO brief claims that this last sentence is limited to "make-whole relief" and that "there is not a word in the legislative history to suggest that other equitable relief was added to § 706(g) to authorize quota remedies." AFL-CIO Br. 15.

"Going beyond the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co. v. Patterson*, 102 S.Ct. 1534, 1540 (1982). And the legislative history of Title VII is hardly so unambiguous as to offer "the best of circumstances." See the comments on the legislative history of § 703(h) in *id.* at 1540 n.15; Note, *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 1, 287 (1982) (a "morass"). But as the United States argued to this Court in *Weber*, see *Brief for the United States and the Equal Employment Opportunity Commission, United Steelworkers of America v. Weber*, pp. 28-35, 63-71, ("U.S. *Weber* Br. ——") the issue of quotas and numerical remedies was very much on

Congress' mind with respect to Title VII.[10] Thus, "prior to the enactment of the 1972 amendment, the Federal Courts regularly, and with notable uniformity [in at least five circuits] ordered class-wide race-conscious remedies . . . [including] the use of numerical ratios." U.S. *Weber* Brief 32-33. Congress was very much aware of this and made clear in its analyses of the final version of the bill that it intended to make "present case law . . . govern." 1972 Leg. Hist. 1844 (Sen.), 1856 (House) (analyses accompanying Conference Reports).

"Congress' perception of the law that it was shaping or reshaping" is crucial. *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 102 S.Ct. 1825, 1839 (1982). Obviously, "[i]t is always appropriate to assume that our elected representatives, like other citizens know the law." *Ibid.*

The only fair conclusion from this sequence of events is that Congress approved the use of affirmative action under Title VII as a remedy where employment discrimination is proven.

And, as in the *Merrill Lynch* case, 102 S.Ct. at 1840, "this Court, as did other federal courts and federal practitioners, [has] simply assumed" the propriety of such relief. See *Regents of the University of California v. Bakke*, 438 U.S. at 301-02 (Powell, J.); *id.* at 366-67 (Brennan, Marshall, White and Blackmun, JJ.); *Fullilove v. Klutznick*, 448 U.S. 448, 510-11, 513 (1980) (Powell, J.); *cf. General Bldg. Contractors Ass'n v. Pa.*, 102 S.Ct. 3141, 3155 ("Nor is the imposition of minority hiring quotas directly upon petitioners the sort of remedy that may be imposed without regard to a finding of liability"); *Contractors Ass'n of Eastern Phila. v. Sec'y of*

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[10] The House Committee Report accompanying the House bill stated that "Affirmative action is . . . essential for more effective enforcement of Title VII in remedying employment discrimination." 1972 Leg. Hist. 73.

Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

The Union position also produces an anomalous result. In *Weber*, the Steelworkers argued and the Court agreed that voluntary remedial goals were permissible without proof of discrimination. Is it reasonable that a numerical goals remedy disadvantaging senior white workers is permissible (even to the extent of overriding seniority) simply by a private agreement of the parties and absent *any* evidence of discrimination, but not if judicially and publicly imposed *after a finding of flagrant discrimination?* Surely that would be astonishing in a statute which gives courts the power to "fashion the most complete relief possible" in order to "allow the most complete achievement" of the eradication of discrimination and its effects, and it runs counter to opinions frequently expressed in this Court. See, *e.g.*, Powell, J., in *Bakke*, 348 U.S. at 302. Indeed, *Weber* has been interpreted by one of the nation's leading experts on Title VII as implicitly approving judicially ordered numerical goals. Blumrosen, *Affirmative Action In Employment After Weber*, 34 Rutg. L.Rev. 1, 39 (1981).

D. The Constitution Does Not Prohibit the Relief Ordered by the District Court.

Petitioners claim also that a court violates the equal protection aspect of the Fifth Amendment when it orders relief that disadvantages whites. But this Court's decisions and opinions unequivocally refute such contentions. In both *Regents of the University of California v. Bakke*, *supra* and *Fullilove v. Klutznick*, *supra*, the Court held that race-conscious measures to remedy the effects of discrimination are permissible, even if they involve numerical quotas, favor unidentified group members, burden non-minorities, 438 U.S. at 448; 448 U.S. at 484, 514, and are not the "least restrictive means of implementation." *Id.* at 508. And such race-conscious numerical goals can be used to remedy discrimination even if the

beneficiaries are non-victims, as they will often be in school desegregation contexts, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); university admissions (*Bakke*); or minority set-asides, and even if the violation is only statutory and not constitutional. *Fullilove*, 448 U.S. at 483, 510, 513 (Powell, J.). Nor is it a decisive objection that "it may disappoint the expectations of nonminority" members, *id.* at 484, 514, whether those expectations be nonspecific as in the contracting context, or specific, as in the seniority setting. As Justice Powell noted, " 'a sharing of the burden' by innocent parties is not impermissible. *Franks, supra* at 777; see *Albemarle Paper Co., supra*; *United Jewish Organization* [*v. Carey*, 430 U.S. 144 (1977)], *supra*." *Id.* at 484.

In *Bakke*, Justice Powell also posited a state interest other than past discrimination, to justify a race-conscious approach—a diverse student body in order to obtain a diversity of views. So here, a representative number of blacks on the police and fire departments has been shown to be a vital state interest. Reports by the National Advisory Commission on Civil Disorders (Kerner Commission), the Civil Rights Commission and others, have made it clear that public safety and the avoidance of riot and disorder require an integrated police force. Indeed, Title VII was amended to include state and local governments, partly in order to deal with this problem. See, *e.g.*, S. Rep. No. 415, 92d Cong., 2d Sess. 10 (1971); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979): Note, *Race As An Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U.L.Rev. 413, 427-30 (1979) (citing studies).

POINT II

OPTIONS ARE AVAILABLE TO A DISTRICT COURT IN ORDER TO SAFEGUARD THE PROGRESS UNDER AN AFFIRMATIVE ACTION DECREE WITHOUT ENCROACHING UPON SENIORITY.

A district court thus has and should exercise the power to preserve any modest gains achieved under a still-operative decree, and to prevent the minority representation from falling much below the level achieved. See *Brown v. Neeb*, 644 F.2d 551, 565-66 (6th Cir. 1981) (Brown, J. concurring) ("The City should be preliminarily enjoined from laying off in such a way that would reduce the proportion of minority persons in the fire department."). The type of modification entered below obviously accomplishes that purpose, but it entails burdening innocent nonminority workers. Such a burden, the lay-off of innocent people who have worked at their jobs for many years and who themselves have discriminated against no one, is a dismaying propect. A district court should try to avoid such layoffs, and should explore alternatives before adopting such a course.

A variety of options are available. *Last Hired, First Fired* 49-55; Joseph, *Last Hired, First Fired: Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 Col.J.L. & Soc'l Probs 343, 398-400 (1975). These include work-sharing plans, reduced work weeks, elimination of overtime in both the department in question and elsewhere, payless holidays, rotational layoffs under which all employees are laid off for a limited period, attrition or simply exempting city departments that are under a Title VII order or consent decree from the operation of Proposition 2½. See *Brown v. Neeb*, 644 F.2d at 566 ("the City may . . . refrain from laying off in the fire department and seek savings in other areas . . . .").

Further, there is no reason to accept the assumption that Proposition 2½ precludes the state from having the power if ordered by the court.[11]

In *United States v. Peters*, 5 Cranch 114, 3 L.Ed. 53, 59 (1808) the Supreme Court considered the propriety of a law passed by the Pennsylvania legislature authorizing the Governor to frustrate a money judgment of the Federal Court. In insisting that the Court's order be obeyed, Chief Justice Marshall wrote:

> "[I]f the Legislatures of the several states may, at will, annul the judgments of the court of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. . . ."

In *Cooper v. Aaron*, 358 U.S. 1, 17 (1958), involving school desegregation, a unanimous Supreme Court reaffirmed this principle. The Court stated:

> "In short, the constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislatures . . . nor nullified indirectly. . . ."

The Court rejected the defense of the Board of Education that "vindication of [constitutional] rights was rendered difficult or impossible by the actions of" the legislature. *Id.* at 16.

These alternatives are indeed less onerous on non-minority employers and consistent with the operation of

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[11] Since the affirmative action orders have as their source of authority the Fourteenth Amendment, either directly or through the Civil Rights Act of 1871 or Title VII of the Civil Rights Act of 1964 as amended, the Eleventh Amendment defense against the power of the Federal Courts is not available. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Even if the State enjoys Eleventh Amendment immunity, the City of Boston and the police and fire departments do not. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Lincoln County v. Lemung*, 133 U.S. 529 (1889).

the seniority system. *Amici* therefore believe that in any case involving possible lay-offs, these alternatives should be considered by the parties and the trial court in a manner consistent with the goal that the progress achieved should not be undercut, which is the bedrock consideration. See *Brown v. Neeb, supra.*

The power of the District Court to order the police and fire departments to consider alternatives consistent with its prior order is clear. In *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979) the Supreme Court said, "It is also clear that [the State Departments of] Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so." See also *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971); *Griffin v. County School Board,* 377 U.S. 218 (1964); *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958).

In *Swann* the Court said:

> "School authorities have wide discretion in formulating school policy . . . . However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall. *State policy must give way when it operates to hinder vindication of federal constitutional guarantees.*" 402 U.S. at 45.

Finally, in *Rhem v. Malcolm,* 507 F.2d 333, 341, (2d Cir. 1974) quoting from *Hamilton v. Love,* 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) the Second Circuit held:

> "Inadequate resources can never be an adequate justification for the State's depriving any person of his constitutional rights."

In *Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977) the Minnesota legislature refused to appropriate funds to

improve an institution for the mentally retarded despite an express court order that the State operate the institution in a constitutional manner. The State contended that its obligation to effectuate the constitutional rights of the mentally retarded was, in effect, contingent upon the actions of the state legislature with respect to any specific budget request. The Eighth Circuit rejected the State's defense, and stated:

> "If Minnesota chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations. * * *. There must be no mistake in the matter. The obligation of the defendants to eliminate existing unconstitutionalities does not depend on what the Legislature may do, or upon what the Governor may do, or, indeed upon what defendants may be able to accomplish with means available to them. As stated, if Minnesota is going to operate institutions like Cambridge, their operation is going to have to be consistent with the Constitution of the United States."

550 F.2d at 1132.

Thus, given the clear power of the court to ensure that its original affirmative action orders not be undone, claims of financial consideration do not end the inquiry. Rather, these claims themselves should have been explored and all alternatives considered before the assumption was accepted that the clash between seniority and affirmative action had to be resolved by the courts below.

Because these alternatives were not considered, the courts moved to decide the difficult question of reconciling seniority with the eradication of discriminatory effects without explicitly determining whether that was necessary. It thus appears that insofar as the writ was granted to resolve that issue, it was premature and should be dismissed as improvidently granted.

CONCLUSION

For the reasons stated, the judgment should be affirmed or the writ dismissed as improvidently granted.

Respectfully submitted,

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February 7, 1983

APPENDIX

[SEAL]

THE COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Boston, MA 02108

Regina L. Quinlan, Esq.
6 Becaon Street
Boston, Massachusetts 02108

RE: Edward J. McNelley, Gerald V. Doucette, Thomas P. Maloney, Walter J. Casale, Sheila Kaplan, William T. Morrissey, Charles R. Webb, Howard Dacey, Margaret O'Malley, James Moore, William Sweeney, Donald Green v. the Boston Police Department, D-1465

SUBJECT: Appeals brought under the provisions of Chapter 31, Section 43, of the General Laws with respect to the appellants' demotions from their positions of Police Sergeant, respectively.

DESIGNATED HEARING OFFICER: Robert E. Tierney, Esq.

DECISION: The Civil Service Commission voted on January 20, 1983 at its executive meeting at 2:45 p.m. to acknowledge receipt of the report of Hearings Officer Robert Tierney, dated November 12, 1982, to adopt the findings of fact contained therein, and to reverse the action of the appointed authority. The Commission does not seek to inject itself into management decisions or to interfere with management prerogatives. That is not the issue here, no matter how vociferously the appointing authority may argue otherwise. On the contrary, the actions of the appointing authority are such a flagrant violation of any standard even remotely resembling rational personnel practices that a conclusion that the appointing authority acted in bad faith is inescapable. This conclu-

sion is buttressed by the appointing authority's use of available monies to pay overtime at time and a half to officers who were being retained on the force rather than using those funds to compensate other laid off officers at straight time to perform the same work. This hardly smacks of austerity or economy, let alone sound management. The Commission, accordingly, finds the appointing authority totally lacking in credibility. Indeed, the Commission concludes that the appointing authority was utilizing Proposition 2½ as a cover for actions which were not motivated by reasons of economy at all. The appointing authority is directed to restore the appellants to their respective positions without loss of compensation or other rights.

A copy of the hearing officers report is available upon request.

COMMISSIONERS: James W. Agoritsas, Chairman (in favor) John F. Donegan (in favor), Richard H. Linden (in favor), Joseph M. Duffy (in favor), and Wayne A. Budd (against).

A true record. Attest:

/s/ Victoria M. Douglass
VICTORIA M. DOUGLASS
Secretary to the Civil
Service Commission 2-3-83

VMD/dg

cc: Lawrence J. Ball, Esq.

FILED
FEB 10 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

BOSTON POLICE PATROLMEN'S ASS'N, INC.,

Petitioner,

v.

PEDRO CASTRO, *et al.*

NANCY B. BEECHER, *et al.*,

Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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QUESTION ADDRESSED

Is this appeal moot?

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Nos. 82-185, 82-246, 82-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

v.

BOSTON CHAPTER, NAACP, et al.

BOSTON POLICE PATROLMEN'S ASS'N, INC.,

Petitioner,

v.

PEDRO CASTRO, et al.,

NANCY B. BEECHER, et al.,

Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.

On Writs of Certiorari to the United States Court of Appeals For The First Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus Curiae

The NAACP Legal Defense and Educa-

tional Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York in 1940. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel.

The opinion of the court of appeals in the instant case raises a number of issues directly affecting pending litigation involving Blacks represented by the Legal Defense Fund. Amicus believes that the decision of the first circuit was correct and that, should this Court reach the merits of this case, that decision should be affirmed. We do not, however, believe it is necessary to reach the issue of whether to affirm, because events occurring

since the decision of the court of appeals have rendered this controversy moot.

I. This Appeal Is Moot

The district court order challenged in this Court was entered on August 7, 1981, to resolve a dispute as to how to select 515 Boston policemen and firefighters to be terminated because of a 1981 city financial crisis. The respondents, anxious to preserve the progress that had been made in integrating blacks and hispanics into the police and fire departments, urged that fewer than 15% of those be laid off should be black or hispanic. The petitioners argued that the group to be fired should be selected solely on the basis of seniority, and thus be about one half non-white. The district court concluded that the group should be chosen in the manner urged by respondents. Petitioners appealed on

behalf of the 222 white officers adversely affected by the order of the lower court. When this case was pending in the court of appeals, 515 officers had in fact been laid off; the first circuit affirmed the district court's decision and refused to direct the rehiring of the 222 whites at issue.

Today, however, those 222 whites, and indeed all of the other 515 dismissed officers, have been offered their jobs back. In June 1982, barely a month after the decision of the court of appeals in this case,[1/] Massachusetts enacted legislation providing Boston with funds to rehire the police officers and firefighters

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1/ A similar coincidence occurred in August of 1982 when Boston city officials suddenly agreed on a proposal to avert the lay offs only two days after the district court order in this case. Boston Globe, August 10, 1981, p. 1.

who were laid off in 1981, and expressly requiring the city to do so. 1982 Mass. Acts, ch. 190, § 25. That legislation also provides that the 515 officers terminated during the 1981 layoffs cannot again be laid off for fiscal reasons. Id. By July 1, 1982, all the police officers and firefighters available for recall had been reinstated.[2/]

The practical controversy which prompted the disputed court order has thus ended. There is no need or reason for this Court to make the painful decision as to who will be dismissed, for the dismissals are over. Since July, 1982, the city of Boston, far from reducing the size of its police and fire departments, has actually been hiring new police officers and firefighters. On November 4,

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2/ Petition for Writ of Certiorari, No. 82-185, p. 8.

1982, the police department swore in 60 new recruits;[3] since the department apparently intends to remain at its current size of 1800 officers,[4] additional officers will be hired in the months ahead to make up for attrition. An additional 40 firefighters were sworn in on December 8, 1982.

The injunction entered in this case on August 7, 1982, regarding "reductions in force ... on account of lack of funds"[5] no longer has any operational significance, for no such layoffs are occurring or contemplated. None of the parties suggests that layoffs in the Boston police and fire departments are likely to recur in the future. Unlike cyclical industries, such

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3/ Boston Globe, November 5, 1982, p. 17.

4/ Boston Globe, November 7, 1982, p. 25.

5/ Petition for Writ of Certiorari, No. 82-185, p. A.28.

as construction or automobile manufacturing, where layoffs or recalls occur with each change in the economy, reductions in municipal work forces, particularly among police officers and firefighters, remain happily rare, and are resorted to only in the face of the most extraordinary and unusual fiscal difficulties. The controversy which gave rise to the injunction at issue in this case has thus ended, and there is no reasonable expectation that any Boston police officers and firefighters, least of all the 222 whites adversely affected by that injunction, will be laid off again. See Murphy v. Hunt, 71 L.Ed.2d 353, 357 (1982); DeFunis v. Odegaard, 416 U.S. 312, 316-19 (1974).

The United States[6/] and the Fire-

6/ Brief for the United States, p. 9, n.8.

fighters Union[7/] note that there are still pending before the Massachusetts Civil Service Commission administrative appeals on behalf of white officers laid off in 1981. Those appeals, of course, no longer seek reinstatement, since the officers involved have been rehired; the relief at issue is back pay for the ten months during which they were laid off. The only question technically before this Court, whether the district court erred in issuing its order of August 7, 1981, is itself moot. The existence of these related administrative proceedings might give the parties here a legally cognizable interest in a review by this Court of that district court order, but only if the parties to and the legal issues presented by those proceedings and the instant case were identical.

7/ See Brief for Boston Firefighters, No. 82-195, p.7, n.1

In University of Texas v. Camenisch, 451 U.S. 390 (1981), the plaintiff, a deaf graduate student, sought to compel the university to provide him with a sign-language interpreter. The district court entered a preliminary injunction requiring that the university do so and the court of appeals affirmed. By the time the case reached this Court, however, Camenisch had graduated. Although this development rendered moot the propriety of the preliminary injunction, there remained a dispute as to whether Camenisch or the university should pay for the services of the interpreter. This Court nonetheless vacated the order of the court of appeals as moot, reasoning that the lower court decisions regarding the preliminary injunction were not "tantamount to decisions on the underlying merits...." 451 U.S. at 394. It

emphasized that the issues raised by a motion for a preliminary injunction and those raised by a final decision on the merits were not the same. 451 U.S. at 394-398. See also Murphy v. Hunt, 71 L.Ed.2d 353, 356-57 n.5 (1982) (mootness of claim for pre-trial bail not avoided by existence of claim to bail on appeal).

There is little reason to believe that the resolution of the instant appeal would be dispositive of, or even relevant to, the pending administrative proceedings. The issues here concern, inter alia, the meaning of Title VII of the Civil Rights Act of 1964 and the scope of the authority of a federal district court judge to supervise and enforce a consent decree. The issue in the state proceeding will be whether under state law a city agency which lays off employees in a manner required by

a binding federal decree must compensate with back pay those adversely affected by that decree. Regardless of whether the district court erred in issuing its order of August 7, 1981, the defendants were obligated to comply. Walker v. City of Birmingham, 388 U.S. 307 (1967). It is, of course, conceivable that Massachusetts law will be construed by agencies or courts of that state to require redress for whites injured by that compliance. But the parties suggest no theory, and none can readily be imagined, that would lead to the conclusion that a city's liability for obeying a federal court injunction would depend on whether or not that injunction was subsequently reversed.

The parties to the administrative proceedings, moreover, are not before this Court in an adversarial relationship.

The plaintiffs in those proceedings are white officers laid off in 1981, none of whom are parties to the federal litigation. The defendant in those state proceedings is the city of Boston; the city is a nominal party to the instant case, but it took no position on this controversy in the lower courts, did not appeal from the district court's order, and apparently does not intend to file a brief in this Court. The only participant in the state administrative proceedings that is actively involved in the instant case is the Massachusetts Civil Service Commission, whose presumed role in those proceedings is not that of a party but of a judge. The Civil Service Commission and the unions urge this Court to reverse the district court order of August 7, 1981; it is unclear, however, whether under state law

the impact of any of such a reversal would serve to support or to undermine the administrative claims of the laid off officers. The only party disputing the petitioners' contentions in this Court are the federal plaintiffs; but they assert no interest in the outcome of the state administrative proceedings, and claim no authority or desire to act on behalf of either the city of Boston or the white officers pursuing those appeals.

There is a suggestion that the language of the order entered by the district court may directly interfere with the ability of the Civil Service Commission to grant back pay or other relief in the pending administrative proceedings. The relevant portion of that order provides:

> 4. In the event that a firefighter's appeal of termination to the members of the Massachusetts

> Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.8/

The United States speculates that this "could be interpreted as barring the Commission from granting any back pay".9/ The Firefighters in their petition for writ of certiorari asserted that this order actually forbade any relief in those administrative proceedings,10/ although they do not advance that argument in their brief on the merits.11/

8/ Petition for Writ of Certiorari, No. 82-185, p. A.29.

9/ Brief for the United States, p. 9, n.8 (emphasis added).

10/ Petition for Writ of Certiorari, No. 82-185, p. 17.

11/ See Brief for Boston Firefighters, No. 82-195, p. 7, n. 1.

A literal reading of the quoted paragraph indicates that the district court intended only to forbid the Civil Service Commission from ordering that layoffs occur in a manner in conflict with the decision of the court. The plaintiffs in the proceedings below never sought to limit the rights of whites to back pay, and there is no reason to believe that the trial judge intended to do so. If the Civil Service Commission were to attempt to provide some form of compensation to police officers or firefighters who were laid off between August 1981 and June 1982, such an effort could not readily be characterized as "invalidating or interfering with" the federal court order. In any event, since the lay off controversy which gave rise to the disputed August 7, 1981, order no longer exists, that order, including

paragraph 4, must be vacated as moot, thus removing any possible doubts as to the ability of the Civil Service Commission to act as state law requires in disposing of the pending administrative appeals.

The United States urges that this appeal is not moot because the injunction at issue "prohibit[s] indefinitely the application of the Massachusetts seniority statute."[12/] But the issuance of a final injunction does not create a permanent case or controversy which endures regardless of changes in the circumstances giving rise to the litigation. If pending appeal the dispute to which an injunction is addressed has ended, that injunction is ordinarily vacated as moot.[13/] Thus if the under-

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12/ Brief for the United States, p. 9, n.8.

13/ University of Texas v. Camenisch, 451 U.S. 390, 398 (1981); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

lying controversy has abated there will be no injunction whose correctness need be determined.

The Firefighters assert that "the underlying dispute as to the validity of [the district court order] continues."[14/] The scope and intensity of the ongoing public dispute about affirmative action is illustrated by the large number of amicus briefs in this well publicized and controversial case. Many of the amici have a long standing interest in this subject, and press this Court for a decision vindicating their historic positions. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972). To this latest battle concerning race-conscious remedies, however, the 222 white police officers and firefighters formerly

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14/ Petition for Writ of Certiorari, No. 82-185, p. 17.

affected by the district court order are now mere spectators. They have returned to their jobs, are not in danger of being laid off again, and face no obstacles in obtaining whatever redress for that lay-off state law may provide. The public controversy about affirmative action may be live, concrete, and fiercely contested, but the legal controversy concerning the district court order of August 7, 1981, is moot.

II. The First Circuit Should Be Affirmed

As noted at page 2, we believe the decision of the First Circuit is correct. Accordingly, should this Court determine to reach the merits, we believe that the First Circuit should be affirmed.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded with instructions to vacate as moot the order of August 7, 1981.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner*,

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NANCY B. BEECHER, *et al.*, *Petitioners*,

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BOSTON CHAPTER, NAACP, *et al.*, *Respondents*.

On Writs Of *Certiorari* To The United States Court Of Appeals For The First Circuit

Brief Of The National Bar Association, Inc. And The National Association For Equal Opportunity In Higher Education

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QUESTION PRESENTED

This *amicus* brief will address the following question:

Whether the district court exceeded its authority in amending a consent decree in an employment discrimination case requiring that layoffs of city employees be made not on the basis of a pre-existing system of seniority mandated by a state statute, but rather on a court ordered modified seniority system designed to assure the integrity of the court's earlier order.

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Dayton Board of Education v. *Brinkman*, 443 U.S. 526 (1979)	18
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United Steelworkers of America v. *Weber*, 443 U.S. 193 (1979) 18, 20

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Banks, *Judge Banks Speaks Out*, Black Enterprise 24 (Dec. 1980) 22

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O. Kerner, *Report of the National Advisory Commission on Civil Disorders* (1968) 21

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Rule, *Scars Linger From Assault in Gravesend*, N.Y. Times, Jan. 17, 1983 ..... 21, 22

Smith, *Managing in a Multi-Ethnic, Multi-Racial Workforce*, 40 Fed. B. News & J. 163 (1981) 18

Stuart, *Economic Troubles of Miami's Blacks is Major Issue Facing Prospering City*, N.Y. Times, Jan. 16, 1983 22

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Brief Of The National Bar Association, Inc. And The National Association For Equal Opportunity In Higher Education

Amici Curiae

CONSENT OF THE PARTIES

Petitioner and respondents have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The *National Bar Association* (NBA) is a professional member organization of predominantly black lawyers. Founded in 1925, the NBA has been concerned about racial discrimination and its past effects on the black citizenry of this country. To this end, the NBA has appeared before this Court on numerous occasions to express its views and to provide jurisprudential guidance so as to make the slave progeny other than a limited partner in the labor/economic mainstream of America.

In the past, the NBA has appeared before this Court to express its views on subjects of interest to Black America and to offer diverse jurisprudential insights for the maintenance of domestic tranquility. The NBA is before this Court again for the same reasons.

The NBA maintains its National Headquarters at 1773 T Street, N.W., Washington, D.C. 20009. Its National President is Warren Hope Dawson, Tampa, Florida.

The *National Association For Equal Opportunity in Higher Education* (NAFEO), 2243 Wisconsin Avenue, N.W., Washington, D.C. 20007, founded in 1969, is a non-profit voluntary, independent association of 114 historically and predominantly black colleges and universities enrolling some 200,000 students.

The historically and predominantly black institutions of higher education whose views are presented in this *amicis* brief, have backgrounds of perpetual service to all people, with missions and goals to make educational opportunities a reality rather than an empty expectation.

This Association has a unique interest in this litigation. This brief is respectfully submitted to present the position of NAFEO consistent with its history and purpose which NAFEO feels may not adequately be presented by the parties in this appeal.

Employment discrimination lawsuits concern not only the individuals involved. Such suits vindicate the public interest in

a labor market free of unlawful discrimination. This interest, already great in the case of a private employer, looms even larger when the employer to be sanitized of discriminatory practices, and the effect of such practices, is a public one like the city of Boston. *Amici* are here in what they conceive to be the public interest.

STATEMENT OF THE CASE

The judgment of the court of appeals was entered in two consolidated employment discrimination cases, originally filed in the early 1970's, one of which involved the Boston Police Department and the other the Boston Fire Department. The cases successfully challenged the manner in which applicants for public safety jobs were chosen. The relief granted in those cases affected the hiring procedure for police and firefighters in municipalities throughout Massachusetts. The court of appeals judgment being reviewed here affirmed a district court modification of the remedy in the discrimination cases; the modification addressed layoffs in the Boston police and fire departments.

The Police Case

Six blacks and two hispanics who wanted to join the Boston Police Department, but who had failed the Massachusetts Civil Service Police Entrance Examination, filed a lawsuit in 1970 against the Civil Service Commission and the Boston Commissioner of Police, challenging the validity of the test and other aspects of the process by which police officers were recruited and hired. *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971). The plaintiffs claimed that the alleged discriminatory acts violated the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983.

After a bench trial, the district court found that the Civil Service Commission had administered a "general intelligence type of test" consisting of one hundred multiple-choice questions which tested such skills as reading comprehension, analo-

gical reasoning and numerical sequencing. *Castro, supra*, at 941-42. The court held that the tests were "not rationally or empirically significantly related to the capacity of applicants to be trained for or to perform a policeman's job," *id.* at 942, and noted with some acerbity that "[t]he categories of questions sound as though they were drawn from *Alice in Wonderland*." *Id.*

Results of the September, 1970 test, the only one for which results were compiled according to race, showed that 25% of the black applicants passed, 10% of hispanics passed, and 65% of all other applicants passed. The court held that the test "gave a discriminatory advantage to white persons . . . [and thus] deprived plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment and created liability under 42 U.S.C. §§ 1981 and 1983." *Id.* at 944.[1]

The district court also found a great disparity between the percentage of minorities on the police force and the percentage of blacks living in Boston. Between 1960 and 1970, the percentage of blacks in Boston increased from 9 to 16.3%, the court found, while the percentage of blacks and hispanics on the police force increased from 2 to 3.6% during that period. *Id.* at 935. (The 3.6% statistic was later determined to be mistakenly high. On appeal, the parties stipulated that minorities comprised 2.3% of the police department in 1970). *Castro* v. *Beecher*, 459 F.2d 725, 728 n.1 (1st Cir. 1972)). The court of appeals determined the combined black and hispanic population to be 23% of the city's total.

Despite finding an invalid test with a discriminatory impact, the district court refused to grant the requested class-based

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[1] The court also found that the test violated a state statute, Mass. Gen. Laws Ann. ch. 31, § 10, providing in pertinent part that police entrance examinations had to "relate to matters which will fairly test the fitness of the applicants actually to perform the duties of the positions for which they apply." *Castro* v. *Beecher*, *supra*, at 937.

relief, which would have provided for priority hiring of blacks and hispanics. The court held that these minorities were not the only groups injured by the test, but that it had a negative impact on all applicants who "did not share the prevailing white culture . . . ." *Castro* v. *Beecher*, *supra*, at 943. The court limited its relief to enjoining further use of the invalid test and ordering the creation of new, job-related tests. *Id.* at 945.

On appeal, the First Circuit upheld the district court's finding that the test was discriminatory, but held that the limited injunctive relief granted should be supplemented by affirmative, class-based relief structured to bring about an immediate increase in the number of blacks and hispanics actually employed as police officers. *Castro* v. *Beecher*, *supra*, at 731-32. On remand, a consent decree was entered into among the parties, the chief feature of which was a hiring plan providing that minorities and non-minorities would be hired on a one-to-one basis. *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973).

After the decree was entered, twenty-seven towns and cities obtained a state court order requiring them to honor existing state laws granting preferences to veterans and residents in hiring police and firefighters. This would have nullified the effect of the consent decree. However, in 1974, the Supreme Judicial Court of Massachusetts ruled that statutory preferences were to observed *within* each of the groups created by the consent decree. *Director of Civil Service* v. *Town of Milton*, 366 Mass. 498, 320 N.E.2d 883 (1974).[2]

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[2] The state judiciary entered the case when Massachusetts municipalities brought a bill in equity to compel the Civil Service Commission to comply with the hiring preference accorded residents of the hiring municipality. Mass. Gen. Laws Ann. c. 31, § 58 (West 1979). (The Civil Service law was recodified on Jan. 1, 1979). The residents' preference was formerly at section 48A. The Superior Court of Suffolk County found the statute to be constitutional and required compliance therewith. *Town of Milton* v. *Civil Service Commission*, 365 Mass. 368, 312 N.E.2d 188 (1974). The Supreme Judicial Court affirmed on the grounds that the statute did not violate either the

A new consent decree was entered into on July 7, 1975, which divided applicants into four groups: Group A, consisting of minorities who failed any of the invalid tests given in 1972; Group B, consisting of persons, most of whom presumably would be white, who passed one of the invalid tests but had not been certified for permanent posts; Group C, comprised of blacks and hispanics who never took one of the old, illegal tests, but who took and passed the 1972 test; and Group D, comprised

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"right to travel" inherent in the federal constitution's guarantee of liberty, or the equal protection clause. The court noted that the Civil Service Commission argued that the residents' preference might be inconsistent with the consent decree entered in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973), but would "express no opinion on the question whether such a conflict exists or what the proper result would be if it does." 365 Mass. at ____, 312 N.E.2d at 196. However, it is of interest that the Civil Service Commission contended that "*if the procedures required by [the residents' preference statute] conflict with the priority system set up in the decree the operation of the statute must yield.*" *Id.* (emphasis supplied).

The state superior court, on remand in the *Milton* case, entered an order requiring towns and cities to appoint police and firefighters in the following order, without respect to the federal consent decree establishing racial preferences: "(1) disabled veterans who are residents, (2) veterans who are residents, (3) residents, (4) disabled veterans who are nonresidents, (5) veterans who are nonresidents (6) nonresidents." *Director of Civil Service* v. *Town of Milton*, 366 Mass. 498, 320 N.E.2d 883, 885 (1974) (*Milton II*). The Supreme Judicial Court, called upon to resolve the conflicting state and federal decrees, ordered that the state preference be applied within each of the groups created by the federal decree. 366 Mass. at ____, 320 N.E.2d at 887-89. The final draft of the consent decrees entered in the police and fire cases in 1975 reflected the Supreme Judicial Court's holding. As it had in the first *Milton* case, the Civil Service Commission in *Milton II* contended that "the supremacy clause of the United States permits the suspension of valid state laws and judgments where their operation might conflict with the effectuation of a Federal judgment designed to remedy constitutional violations." 366 Mass. at ____, 320 N.E.2d at 886. That is of course *Amici's* point.

of all others who passed the 1972 test. *Castro* v. *Beecher*, 386 F. Supp. 1281, 1286 (D. Mass. 1975). In Boston and Springfield, cities with relatively high minority populations, one minority applicant was to be hired for each non-minority applicant; in other municipalities, one minority was to be appointed for every three non-minority appointees. Within racial groups, among minorities, Group A applicants were hired before those in Group C; and among whites, Group B applicants were to be appointed before those in Group D. Veterans and residency preferences were maintained within each of the four groups. The remedial measures were to remain in force until the percentage of minorities on local police and fire forces approximated the proportion of minorities in the communities served.

The Fire Case

The first fire case, a class action, was brought in 1972 against the Civil Service Commission by the Boston Chapter of the NAACP and named plaintiffs. Plaintiffs alleged violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 in connection with the recruitment and hiring of firefighters in Massachusetts. The second fire case was brought in 1973 against the city of Boston by the U.S. Attorney General pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The cases were consolidated. *See Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974).

The Civil Service firefighters' examination, which plaintiffs claimed was discriminatory, consisted of "25 questions of a general intelligence nature," and 75 questions from an instructional manual, known familiarly as the "Red Book." *Id.* at 511. The district court held that the defendants failed to show the test was job-related. The court found that the test had a discriminatory impact on minorities. *Id.* at 514. Ruling that the plaintiffs had established an unrebutted case of race dis-

crimination, the court ordered affirmative hiring relief like that granted in the police case.[3] *Id.* at 521-23.

On appeal, the First Circuit affirmed the district court's finding of discrimination and the relief granted. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

In 1978, new consent decrees were entered into in the police and fire case, retaining the same relief.

Results of the Consent Decrees

As of July 13, 1976, eighty-one Massachusetts municipalities had integrated their police and fire forces to a level within 1% of the minority populations of the communities they served, and had been released from further judicial monitoring. *See Castro* v. *Beecher*, 522 F. Supp. 873, 875-76 (D. Mass. 1981) (in which the district court reviewed generally progress made under the consent decrees while modifying the decrees in the manner challenged here). Boston and other municipalities lagged in achieving proportional representation, yet made considerable progress. By July, 1981, the Boston Police Department was 11.7% black and hispanic: 224 officers out of 1912 were minority. The Boston Fire Department's minority representation stood at 14.7%, or 248 black and hispanic officers of a total of 1690, in contrast to 1970, when 0.9% of the firefighters were minority. *Id.* at 876. The city's minority population had increased during this period to 30%. *Id.*

These were the highest minority percentages reached. At this point, the affirmative action program was affected by

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[3] The relief in the fire case actually served as the model for the consent decree in the police case. The fire case, though begun after the police case, was resolved more quickly. Affirmative hiring relief was granted by the trial court in the fire case; in the protracted police case, the court of appeals ordered affirmative hiring and suggested its form, but the relief was finalized only on remand.

another development. Boston and other towns and cities had to confront restrictions on public spending imposed by a voter-initiated tax ceiling commonly known as "Proposition 2½." Boston targeted its police and fire departments as two areas of retrenchment and planned a series of layoffs. In carrying out the layoffs, it complied with a state statute requiring that employees be let go in reverse order of seniority: last hired, first fired, with the exception that veterans could keep their jobs while more senior police officers and firefighters were dismissed. Mass. Gen. Laws Ann. ch. 30, § 9A; ch., 31, §§ 26, 39 (West 1979).

By the end of July, 1981, some 162 police officers, including 64 minority officers, had been laid off, reducing the number of minority officers from 224 to 150 and the percentage from 11.7 to 8.6. In the fire department, 155 firefighters, including 68 blacks and hispanics, were laid off, reducing their numbers from 248 to 180 and the percentage from 14.7 to 11.7. In addition to layoffs actually carried out, further reductions in force planned and scheduled for completion by August 12, 1981, would have lowered the minority representation on the police force to 6.2%, and that on the fire force to 9.1%. *Castro* v. *Beecher*, *supra*, at 876.

Before the planned layoffs could be given effect, the plaintiffs in both cases petitioned the district court to modify the consent decree in a manner that would forbid layoffs in numbers that would disproportionately affect minorities. They asked that the peak percentages reached before the layoffs began be preserved.

In August, 1981, the district court held that the waves of layoffs conducted pursuant to Proposition 2½ should be treated as unforeseen circumstances not contemplated when the consent decrees were entered into, and which having arisen, warranted modification of the prescribed remedy. *Id.* at 877. Strict application of the statutory provision requiring layoffs in reverse order of seniority would produce "a grievous wrong . . . i.e., a refusal to amend the remedial order would

allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970." *Id.* at 877. The court modified the consent decrees to preserve the minority percentages reached in July, 1981, and ordered that veterans preferences be applied within separate minority and non-minority seniority lists. The modification was appealed to the First Circuit by the police and firefighters unions, which had intervened as interested parties, and by the Civil Service Commission. The court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982).

The court of appeals decided first that the district court was empowered to modify the decree; and second, that it had done so appropriately in this instance. Petitioners then sought and were granted *certiorari*.[4]

ARGUMENT

I. THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN MODIFYING ITS ORIGINAL CONSENT DECREE IN ORDER TO PRESERVE THE INTEGRITY OF THAT DECREE

As the facts indicate, this action which was initiated as three separate cases against the police and fire department was initially commenced by unsuccessful black and hispanic candidates for appointment as Boston Police Officers and Firemen.

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[4] In June 1982, the month after the First Circuit's decision, Massachusetts enacted legislation requiring Boston to rehire all police officers and firefighters terminated since July 1, 1981, and providing funds to enable the city to carry out this mandate. The legislation also provides that the Boston employees let go during 1981 layoffs cannot be laid off again for fiscal reasons. 1982 Mass. Acts., ch. 190, § 25. However, this development does not moot the current matter, inasmuch as the legislation reached only those individuals who lost their jobs during 1981, while the consent decree as modified remains in force for an indeterminate period.

Plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983, with the government subsequently raising Title VII claims.

Between the entering of the consent decree and the subsequent petition for modification this court decided *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). These cases established that a violation of equal protection may not be sustained in an action brought pursuant to 42 U.S.C. § 1983 by a mere showing of disparate impact of governmental action; an intent to discriminate must also be shown.

The petitioners argue that the consent decree was erroneous in light of this Court's intervening rulings in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*. This argument miscomprehends the nature of the consent decree and the scope of inquiry presented by a petition to modify.

In both *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, this Court's concern was with the requisite proof necessary to establish entitlement to relief based on a judicial finding of racial discrimination under 42 U.S.C. § 1981. At bar, the relief sought is not contingent upon proof of racial discrimination. When the consent decree was entered "all issues of proof were dispensed with." *See Sarabia* v. *Toledo*, 601 F.2d 914 (6th Cir. 1979) (on similar facts the Sixth Circuit ruled that the district court did not violate *Washington* v. *Davis* or *Arlington Heights* by entering a subsequent order to effectuate goal of consent decree); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976). Here the relief sought is modification of the consent decree to prevent the erosion of its intended judicial purpose, i.e., to eradicate the vestiges of past discrimination.

Necessarily, consent decrees are two-sided coins. On one side, it is essentially a contract negotiated by parties. On the other side, it is a court order which is subject to change if circumstances warrant. *United States* v. *ITT Continental*

Baking Co., 420 U.S. 223, 236 (1975); *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Motor Vehicles Manufacturers Ass'n of United States*, 643 F.2d 644, 648 (9th Cir. 1981); *N.Y.S. Ass'n for Retarded Children* v. *Carey*, 596 F.2d 27 (2d Cir. 1979); *Brown* v. *Neeb*, 644 F.2d 551, 557 (6th Cir. 1981). Importantly however, "since consent decrees and orders have many attributes of ordinary contracts, they should be construed basically as contracts." *United States* v. *ITT Continental Baking Co.*, *supra*, at 238; *Strouse* v. *J. Kinson Cook, Inc.*, 643 F.2d 883, 885 (6th Cir. 1981); *Brown* v. *Neeb*, *supra*, at 557; *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541, 557 (6th Cir. 1982); *Fox* v. *United States Dept. of Housing*, 680 F.2d 315, 319 (3d Cir. 1982); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). As such, "[t]he binding substantive commands of a consent decree are embodied within the decree's 'four corners.' " *Stotts* v. *Memphis Fire Dept.*, *supra*, at 557, *citing United States* v. *Armour*, *supra*, at 682. While keeping in mind that consent decrees are judicial orders, courts must nevertheless "confine themselves to the agreement the parties consented to have entered." *Fox* v. *United States Dept. of Housing*, *supra*, at 319. Even under circumstances where the consent decree by its terms declares that the defendant has not admitted to the wrongdoing alleged, "the agreement [nonetheless] embodies a compromise; in exchange for the saving of the cost and the elimination of risk, the parties give up something they might have won." *United States* v. *Armour & Co.*, *supra*, at 263. Both parties relinquish the right to litigate the issue of discrimination. The defendant generally submits to limitation on future conduct or agrees to conform to proscribed conduct and "relinquish [any future] right to rebut the allegation of discrimination." The "[p]laintiff foregoes the right to be made whole" through a court imposed remedy. *Stotts* v. *Memphis Fire Dept. supra*, at 557. Indeed, the consent decree is the product of negotiation and compromise; it reflects the conciliation of dispute and concomitantly imposes obligations upon which both parties have the right to rely.

Here, after extensive litigation, the parties voluntarily agreed that the defendants' certification and recruiting procedures were discriminatory because they had produced an underrepresentation of blacks and hispanics in the police department. Additionally, to ameliorate this discriminatory effect, the parties agreed to a court approved remedy. Now that the victims petition for modification of the consent decree—as a necessary incident to its continued effectiveness—the petitioners seek to reopen the decree and relitigate the issue of liability. In short, the petitioners seek refuge from their contractual obligation which is now part of the consent decree. This we believe this Court should not permit.

Deeply rooted in American jurisprudence is the notion that courts of equity have inherent power to enter supplemental orders to enforce, implement and effectuate their judgments and decrees. *System Federation* v. *Wright*, 364 U.S. 642 (1961). That the power is not without limit is equally obvious. Although the power to modify is lodged within the court of equity as a matter of discretion, it cannot lightly "disregard significant changes in fact or law." *United States* v. *Swift*, 286 U.S. 106, 114-15 (1932). A "balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Federation* v. *Wright*, *supra*, at 647-48. Where "there is such a balance of imponderables there must be wide discretion . . . but discretion is never without limits." *Id.* Two relevant matters have occurred since the original consent decree. One, this Court's interpretation of § 1981 in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra;* and second, the City of Boston's systematic program of reduction in force. These two matters present the major issue of inquiry on modification of the consent decree to effectuate its goal and objectives as against relitigation of issues already resolved by the initial consent decree.

Thus, the issue in this case narrows to the scope or limitation of the court's equity power to modify the consent decree. In

this regard the law is clear. Justice Cardozo, cognizant of the Court's power to modify consent decrees, stated that:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. *The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that exist at its making. We are not at liberty to reverse under the guise of readjusting.*

United States v. *Swift*, *supra*, at 119. (emphasis added).

In *Swift* the defendants sought modification of a consent decree which enjoined the continuance of a combination in restraint of trade and commerce in violation of the Sherman Act. The defendant asserted that changed conditions removed any danger of monopolistic control. Content to leave the defendants where the Court found them, "especially since the place [they were found was] the one they agreed to be," Justice Cardozo reasoned that "[t]hey chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." *United States* v. *Swift*, *supra*, at 117. Here, although the petitioners did not directly seek modification under the principles of *Washington* v. *Davis*, *supra*, they do seek the results in this Court by asserting that the consent decree cannot be properly modified to effectuate its remedial purpose. *Swift* prohibits this result.

The merits of the consent decree are within the rule of *Swift* because a petition to modify cannot alter what the litigants obtained through voluntary consent which merged into the initial consent decree. The petition to modify does not seek to alter what the litigants obtained through compromise. The objective of the petition to modify was to maintain the integrity of the initial consent decree. The purpose of the consent decree was to ameliorate the present and continuing effect of past discrimination; to this, the parties agreed. At this juncture, "[t]he court should not determine the merits of the controversy

or the facts underlying the legal position of the litigants presenting the consent decree." *Stotts* v. *City of Memphis Fire Dept.*, *supra*, at 522. *See also Holiday Inns, Inc.* v. *Strand Development Corp.*, 645 F.2d 239 (4th Cir. 1981) (interpreting Justice Cardozo's admonition as "an immediate reminder that we are not to question the right or wrong of the issuance of the [decree]").

A consent decree should not be modified based on a change in the law underlying the decree by a subsequent judicial decision. While this Court has never spoken definitively on the subject, it should be noted that cases where the courts have modified a consent decree based on changes in law are generally instances where the decree proscribed a form of conduct which the courts had previously held to be illegal, but subsequent to the decree the same conduct was declared—by the legislature or the courts—to be legal. Under these circumstances, the decree no longer served its intended purpose. *See, e.g., Systems Federation* v. *Wright*, *supra*, at 697 ("court cannot disregard significant changes in law or fact if it is satisfied that what it has been doing has turned through changing circumstances into an instrument of wrong"). However, in the instant case, the change in law, has not made racial discrimination legal, but has merely changed the quantum of proof necessary to establish a claim at trial. When the parties voluntarily entered into a court approved consent decree proof of discrimination was dispensed with. Most importantly, however, application of *Washington* v. *Davis*, *supra*, would defeat rather than advance the purposes of the consent decree.

In addition, this Court's rulings in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, present no basis for petitioners' assault on the modified consent decree. These cases merely addressed the quantum of proof necessary to establish racial discrimination under 42 U.S.C. § 1981. In the posture of these cases before this Court, proof of racial discrimination is immaterial. To be sure, if a consent decree was entered into prior to trial on the merits the same result would obtain. Such a decree would not constitute an adjudication on

the merits or a finding of racial discrimination. However, the parties would be equally bound by the terms of the decree nonetheless. This is because a consent decree which is the product of delicate and reasoned negotiation and compromise "embodies the legal constraints which govern the behavior of the parties during the life of the decree." *Stotts* v. *City of Memphis Fire Dept.*, *supra*, at 557, *citing United States* v. *ITT Continental Baking Co.*, *supra*, at 236.

Although it is generally recognized that consent decrees are subject to modification, key underlying policy considerations preclude relitigation of issues raised and resolved by an existing decree. *See Brown* v. *Neeb*, *supra*; *Stotts* v. *City of Memphis Fire Dept.*, *supra*. First, relitigation of issues disposed of by a consent decree squanders limited judicial resources. "By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute." *Arc Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976), *cert. denied*, 429 U.S. 862 (1976). Second, both parties relinquish the right to a judicial declaration of their respective rights and duties in reliance upon the consent decree. Such justifiable reliance should not be lightly disregarded. Finally, "[a]s with all final judgments, the parties have a strong interest in the finality of the decision." *Philadelphia Welfare Rights Org.* v. *Shapp*, *supra*, at 1114, 1119. This is the same consideration that underlies the doctrine of *res judicata*. Clearly, firmness and stability are necessary hallmarks of an effective consent decree.

Coupled with longstanding judicial encouragement of private settlements are practical considerations this Court should not blind itself to. Principles of finality take into consideration the practical reality that necessary party litigants may be absent from the jurisdiction; key witnesses may be unavailable; over extended periods of time witnesses ability to recall crucial facts may be significantly diminished. Balancing these overriding interests in finality neither party should be subjected to the onerous burden of reestablishing what has

been decided and reduced to a decree. *See System Federation* v. *Wright*, *supra*, at 647 (1960). *See generally* Comment, *Request By The Government For Modification of Consent Decrees*, 75 YALE L. REV. 657 (1966). Re-examining the underlying basis of the consent decree is inimical to its very purpose—to bring a certain end to litigation.

The policy considerations underlying a consent decree apply with even greater force in employment discrimination cases. A "consent decree reached after negotiation and consultation is the preferred means of balancing the conflicting societal and individual interests inherent in any employment discrimination action." *Stotts* v. *Memphis Fire Dept.*, *supra*, at 559. Intimations to the contrary would no doubt be "inimical to the policy of encouraging the settlement of Title VII actions." *Id.* at 560. This principle has been repeatedly affirmed. *See, e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance were selected by Congress as the preferred means for achieving the goal of unlawful employment discrimination); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (conciliation and voluntary settlement are preferred means for resolving employment discrimination suits). When modifying a consent decree a court must attempt to strike a delicate balance to preserve the integrity of its original order. The standard to be applied is "whether the change serve[s] to effectuate or thwart the basic purpose of the original consent decree." *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). The purpose and goal of the original consent decree was to achieve racial diversity in Boston's fire and police departments extended over an orderly and reasonable period of time. The City of Boston's proposed layoff threatened to frustrate the time element embodied in the decree as well as eviscerate the progress already realized under the court approved consent decree. Therefore, modification by the district court was necessary to preserve the integrity of the decree. Moreover, as a matter of law, the district court cannot be deemed to have abused its discretion in modifying the decree.

II. THE RACE CONSCIOUS MODIFIED CONSENT DECREE IS A PERMISSIBLE USE OF RACE AS A REMEDY OR AS A GOAL

The modified consent decree ordered by the district court and affirmed by the court of appeals is a proper and permissible race-conscious remedial measure. This Court has previously decided that remedial measures that take race into account are constitutionally permissible. *See, e.g.*, *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).[5] In addition, this Court has also held that where there is a finding of racial discrimination, race must be considered in the fashioning of a remedy. *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). Courts are required to tailor the scope of the remedy to fit the nature and extent of the violation. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979).

In *Regents of University of California* v. *Bakke, supra*, it was decided that race may be considered in the formulation of a remedy where there had been a previous adjudicative, legislative or administrative finding of racial discrimination. Although this decision invalidated a special program for the admission of minorities, Justice Powell writing for the majority on the issue of race-conscious remedies explicitly stated:

> This case does not call into question congressionally authorized administrative actions *such as consent decrees under Title VII* . . . .

438 U.S. at 302 n.1 (emphasis added).

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[5] *See* Reid, *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 How. L.J. 381 (1980); Smith, *Managing in a Multi-Ethnic, Multi-Racial Workforce*, 40 Fed.B. News & J. 163 (1981) for a thorough discussion of the need for race-conscious remedial efforts to correct past discrimination.

Thus, this Court recognized that a consent decree was a valid means for the enforcement of Title VII rights and other voluntary remedial measures.

Amici respectfully submit that *Bakke* and *Weber* are adequate authority for the affirmance of the modified decree. This Court in *Weber* examined the employer's remedial measure and decided that it was a sufficiently tailored remedy to correct the previous discriminatory behavior without causing undue hardship upon non-minority individuals. The content of the original and modified decrees was pursuant to the court's judicial recognition that the City of Boston had discriminated against Black and minority job applicants. *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974). Using the analysis of *Weber* and *Bakke*, the reasonableness of the district court's modified consent decree becomes evident.

A race conscious goal which promotes diversification in public sector employment is legitimate and constitutional. *Regents of the University of California* v. *Bakke*, *supra*. The legal rights of victims of past discrimination must be vindicated. The court below recognized this basic tenet and balanced the hardships of white workers with the hardships of black workers. This was just, reasonable and correct for several reasons.

First, it has been recognized by this Court on numerous occasions that in order to fulfill the constitutional mandate of equality for all people, when enforcing constitutional rights of blacks, the expectations of whites may be impacted upon. For illustrations of this concept, *see Jones* v. *Mayer*, 392 U.S. 409, 445-46 (1968) and cases cited therein. In this case, the white workers had expectation interests in the seniority system. These expectations, besides being obtained during a period of racial exclusion, were not "indefeasible rights." *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). On the other hand, the black workers had

legitimate constitutional rights to an effective remedy in a consent decree bottomed on a conclusion of liability. When examining the balancing of the interests of the white workers against the rights of the black and hispanic workers which was achieved by the modified consent decree, it is clear that the decree is just and reasonable. It provides for the maintenance of an 11.7% level of minority public servants in an area with a 30% minority population. A proper compromise, recognizing the needs of all workers, was achieved by weighing the "conflicting societal and individual interests inherent in any employment discrimination action." *Stotts* v. *Memphis Fire Department, supra,* at 560.

A closer look at the consent decree reveals that it does not require the maintenance of minorities equal or approximate to the percentage of minorities in the community; it does not require the retention of unqualifed workers; and it does not require the layoff of all white workers. *See Wygant* v. *Jackson Board of Education,* 546 F. Supp. 1195 (E.D. Mich. 1982). The consent decree does not unnecessarily trammel the interests of white workers. *United Steelworkers* v. *Weber, supra,* at 208. The white workers who are laid off will be in excellent positions for rehiring through reinstatement[6] and the white workers retaining their positions will still dominate the police and fire work forces.

An additional justification for the modified consent decree is that it furthers a legitimate public interest. Even assuming that the white workers had rights in their positions, this Court has recognized in a variety of contexts that individual rights must give way in some circumstances in order to achieve the higher societal goals that are mandated by the Constitution. *See, e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968) (government may spend individual's tax money as it deems necessary); *United States ex rel. Tennessee Valley Authority* v. *Powelson,* 319 U.S. 266 (1943) (eminent domain power used on individual's

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[6] *See supra* at note 4.

property in the public interest); *United States* v. *Ballard*, 322 U.S. 78 (1944) (religious freedom is not absolute); *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944) (religious freedom is not absolute); *United States* v. *Bethlehem*, 315 U.S. 289 (1942) (military draft in the public interest); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Whitney* v. *California*, 274 U.S. 357 (1927) (free speech not absolute individual right).

At the turn of the century, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26 (1905), it was stated:

> This Court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State. . . .'

The maintenance of domestic tranquility compels public service departments, such as police and fire, to be racially diversified. In 1967, President Lyndon B. Johnson directed the Kerner Commission to define the cause of racial disorder in the United States and to make recommendations to restore and preserve domestic tranquility. O. Kerner, *Report of the National Advisory Commission on Civil Disorders* (1968) [hereinafter cited as *Kerner Report*]. Boston was cited by the Report as a city in which there had been "serious disorders" during that year. *Kerner Report*, *supra*, at 65, 323, 325. Drawing upon a considerable amount of information and material furnished by the Boston Police Department, the Commission placed much reliance upon the data as a basis for its recommendations. *Id.* at 172. A number of factors were considered as having contributed to the cases of the disturbances, paramount among them was the deep hostility between police and ghetto communities. *Id.* at 157, 165. The Commission strongly supported the position requiring racial balance in the police forces. *Id.* at 166.

Racial unrest remains pervasive in the United States as has been evidenced by the recent incidents in Miami, New York and New Orleans. *See, e.g.*, Margolick, *Two Justices Bar Broadcast*, N.Y. Times, Jan. 17, 1983, at A1, col. 5; Rule,

Scars Linger From Assault in Gravesend, N.Y., Times Jan. 17, 1983, at B2, col. 5; Stuart, *Economic Troubles of Miami's Blacks is Major Issue Facing Prospering City*, N.Y. Times, Jan. 16, 1983, at 16, col. 1. It is apparent that the recommendations of the *Kerner Report* remain compelling, particularly in Boston. Banks, *Judge Banks Speaks Out*, Black Enterprise 24 (Dec. 1980); *See also* A. Higginbotham, *In the Matter of Color, Race and the American Legal Process, The Colonial Period* 61 (1978).

In the instant case, all workers must bear certain burdens in order to help the society achieve an integrated public workforce. A diversified public workforce is compelled by the public interest.

III. THE DISTRICT COURT'S MODIFICATION OF THE CONSENT DECREE IS CONSISTENT WITH THE COURT'S EQUITY POWERS UNDER TITLE VII AND ITS INHERENT EQUITY POWERS

Petitioners contend that the district court's modification of the consent decrees entered into in these cases must bow to a conflicting state law providing that layoffs must be accomplished in order of reverse seniority. Mass. Gen. Laws Ann. ch. 31, § 39 (West 1979). *Amici* find this position untenable. As the First Circuit noted in affirming the modification, "[i]t is now settled that remedies to right the wrong of past discrimination may suspend valid state laws." *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, at 975. State and local laws have been forced to yield to federal equitable remedies in countless race discrimination cases. Federal courts' power to override or otherwise affect the operation of state laws rests on the Supremacy Clause of the United States Constitution. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Harvest* v. *Board of Public Instruction of Manatee County, Fla.*, 312 F. Supp. 269 (M.D. Fla. 1970).

The Massachusetts statute providing that employees be laid off in order of reverse seniority (with the exception of veterans) is like any other state law: it is inferior to a federal remedy

protecting a constitutional right. *Amici* reject petitioners' contention that the district court, whatever its inherent equitable powers or its powers under Title VII, was specifically barred from according respondents the relief contained in the modification of the consent decrees. Petitioners contend that section 703(h) of Title VII,[7] and cases decided by this Court thereunder,[8] shield "bona fide" seniority systems from interference by courts fashioning equitable remedies in employment discrimination cases. We find petitioners' argument defective on several grounds.

First, in Judge Wisdom's oft-quoted statement, "the equitable powers of the courts exist independently of the Civil Rights Act of 1964." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on reh'g. en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967).

The plaintiffs in the original cases did not come before the court asking for relief within the confines of Title VII alone. The police case was not *even* brought under Title VII, but under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. Any limits to relief that may exist under Title VII can have no possible application to the police case. The fire case

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[7] Section 703(h) reads in pertinent part:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1976 & Supp. III 1979).

[8] *E.g.*, *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982); *American Tobacco* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534 (1982); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Franks* v. *Bowman Trans.*, 424 U.S. 747 (1977); *See also* Comment, *Title VII* v. *Seniority: Insuring Rights or Denying Rights?* (to be published in 26 How. L.J. ___ (1983)).

was brought under both Title VII and sections 1981 and 1983, so that even if any relief were deemed to be precluded under Title VII, it would still be available under the older civil rights statutes and under the court's inherent equity powers. This Court itself held that section 1981 provides a remedy against employment discrimination that exists independently of remedies available under Title VII. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975).

Amici's second ground for objecting to petitioners' claim that the relief granted was prohibited is that the cases relied on by petitioners—cases decided by this Court in which seniority rights clashed with affirmative action plans—have all been concerned with private collective agreements. This Court's decisions in those cases evinced a desire to balance the competing rights of minorities to abatement of past and future discrimination against the rights of private parties to enter into binding collective bargaining agreements without undue government intervention.

Here, however, the alleged seniority rights sought to be protected by petitioners spring *from* government. The beginning and end of such rights lie in a Massachusetts statute, which, like all other state statutes, may be superseded by a valid federal court decree implementing constitutional rights.

Furthermore, *Amici* find the cases relied upon by petitioners[9] to be inapplicable here because they, in one way or another, all turn on the question of whether the actual operation of a seniority system, under the facts of a given case, can be deemed to be a remediable act of discrimination. The issue presented here is whether a statute creating seniority rights can be affected as an incident of relief granted after liability for a separate act of discrimination—unfair hiring procedures—

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[9] *See, e.g.*, cases cited *supra*, at note 8.

has been firmly established. We find persuasive the First Circuit's reasoning on this point:

> We find nothing in this trilogy [of Supreme Court cases addressing seniority and race discrimination] that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. The original consent decrees in the cases before us, decided long before the Supreme Court cases, were directed at such independent violations, the use of discriminatory certification examinations. None of the Supreme Court cases apply to the basic issue at stake here, the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs.

Boston Chapter, NAACP, Inc., supra, at 974-75.

The consent decree modification was no attack on a statutory seniority provision; it was a move to protect earlier granted relief. The modification could properly have been included in the original decree, had the circumstances that led to its issuance been foreseen; it ought not be denied to respondents now.

Petitioners argue at great length that the "rightful place" rule enunciated by this Court in *Franks* v. *Bowman Transportation Co., supra*, is an impassable barrier to the relief granted. While *Amici* have explained, *supra*, why we believe this case, along with other cases raising the seniority issue in an employment discrimination case, is inapplicable here, the vigor with which petitioners assert the rightful place rule requires that Amici respond to their position with particularity.

The rightful place rule, grounded in the tort law tenet that an injured party must be made whole, and restored to the position he would have occupied but for the injury, provides that identifiable victims of discrimination may be granted the seniority that would have accrued to them but for the discrimination. The rule reaches only identifiable victims.

But in any employment discrimination suit, it is not merely the plaintiffs before the court whose injuries are to be redressed. An employment discrimination suit vindicates the public interest in a bias-free workplace. *Fears* v. *Burris Mfg. Co.*, 48 F.R.D. 91 (N.D. Miss. 1969). Remedies granted in such suits must " 'so far as possible eliminate [not only] the discriminatory effects of the past . . . [but] bar like discrimination in the future.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The Court's mandate that remedies should bar future discrimination—the precise form of which can only be guessed at, and the victims of which cannot be enumerated with certainty—directs a tribunal sitting in an employment discrimination case to fashion remedies addressed to systems and policies, as well as to individuals. The rightful place rule is a good rule as far as it goes—but it does not reach all of the interests at stake in discrimination cases.

It is inevitable that in the process of vindicating the public interest, or pursuing a public policy, some non-victims will be aided as individuals; it is no less inevitable that some individual victims of past discrimination will never receive any redress. J. Clay Smith, Jr., formerly acting chairman of the Equal Employment Opportunity Commission, testified at House hearings on the necessity of sometimes aiding individual non-victims of discrimination in order to redress the public's grievance:

> Take a cab company that is regulated by a local public utility commission. The local public utility commission says that you shall not charge but so much per mile. Let's assume the cab company then says, "We are going to violate the law and charge a higher rate."
>
> A member of the public goes to the public utility commission and sues. The commission finds that the cab company, in fact, has charged an excessive amount. The commission then formulates a remedy, and that remedy is that the company has to reduce its charges for the next 50, 60 or 1,000 persons or for a particular period of time.

> Now the victims, the people who paid the excessive amount, are gone. They are all over the country, and can't be identified. So as an equitable principle in order to uphold the law, the courts will allow the equitable relief fashioned by the commission to be imposed even though the people who are benefiting from the lower fees are not the victims who were overcharged.

Oversight Hearings on Equal Employment Opportunity and Affirmative Action Part 1 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 1st Sess., 391 (1981) (statement of J. Clay Smith, Jr., former acting chairman of the Equal Employment Opportunity Commission).

In an employment discrimination case, particularly one involving public employees charged with protecting the public safety, the measure of the adequacy of the relief is not whether any one individual is made whole, but have the effects of the illegal conduct been eliminated?

CONCLUSION

For the foregoing reasons, *Amici* submits that the opinion of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

—v.—

BOSTON CHAPTER, NAACP, INC., et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL BLACK POLICE ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, and ACLU OF MASSACHUSETTS, *AMICI CURIAE*

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Carlson v. Green, 446 U.S. 14 (1980) 38

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972) 43

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Cases: Page:

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Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) 52, 53, 54

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Dugas v. American Surety Co., 300 U.S. 414 (1936) 13

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EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) 18, 32

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Cases: Page:

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Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982) . 17, 18, 28

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United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) 33

United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974) 33

United States v. Miami, 614 F.2d 1322 (5th Cir. 1980), modified en banc, 664 F.2d 435 (5th Cir. 1981) 16

Cases: Page:

United States v. Swift & Co., 286 U.S. 106 (1932) 14

United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) 6, 14

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) . . .passim

Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 102 S.Ct. 972 (1982) 44

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United States Constitution:

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Other Authorities:

Brief of the American Civil Liberties Union and Society of American Law Teachers, Amici Curiae, filed in United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 32

National Advisory Comm'n on Civil Disorders ("Kerner Commission"), Report of the National Advisory Comm'n on Civil Disorders (1968) 54

National Advisory Commi'n on Criminal Justice Standards and Goals, Police (1973) 54

National Comm'n on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Insure Domestic Tranquility (1969) 54

National Comm'n on Law Observance and Enforcement ("Wickersham Commission"), Report on the Causes of Crime (1931) 55

Neuborne, Observations on Weber, 54 N.Y.U.L.Rev. 546 (1979) 25

President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967) 55

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INTEREST OF AMICI*

The National Black Police Association is a nationwide organization currently comprised of 85 local black police associations representing more than 20,000 black police officers throughout the United States.

Among the purposes of the NBPA is the elimination of racial discrimination in public safety departments, particularly in employment with its concomitant effect on improving the delivery of public safety services to all members of the community. Based on its experience, there simply is no question that a significant representation of minorities at all levels of public safety employment curtails official brutality and corruption, lessens racial tensions, and

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

greatly increases respect for and hence cooperation with public safety officers.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Massachusetts is a state affiliate of the national ACLU.

The ACLU's long standing commitment to equal protection of the laws has led it to conclude as a matter of policy that our country's history of racism "cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color blind' . . . standards for selection, promotion, or retention" in employment and in education, and that the use of "numerical remedies" is appropriate to overcome our nation's legacy of discrimination. Application of this race conscious policy is particularly appropriate in the

context of public safety employment, in which there has been an historical exclusion of minorities and in which the substantial representation of minorities is so crucial to the effective delivery of public safety services to all persons.

For the reasons set forth in this brief, the NBPA, the ACLU, and the ACLU of Massachusetts urge this Court to affirm the judgment of the First Circuit.

SUMMARY OF ARGUMENT

These cases involve an attempt by the plaintiffs-respondents, and to a lesser degree by the City of Boston and its Police and Fire Commissioners, to evolve remedial mechanisms designed to eliminate the effects of racially discriminatory employment policies which had been judicially determined to violate the law.

Although the remedial plan in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), was upheld by this Court even without the underlying judicial findings which exist here, the focus here as in Weber is on a negotiated agreement designed to eliminate the effects of past discriminatory practices. In contrast with Weber, the fruits of the negotiations were codified, not in a collective bargaining agreement, but in a series of consent decrees. When the passage of time and an unforeseen change in the economic climate threatened the parties' initial agreements, the plaintiffs sought to modify the original agreements to preserve the original intent of the parties. The result was the modified consent orders at issue here which were approved by the district court without opposition from the City of Boston or its Police and Fire Commissioners, none of whom has ever con-

tested the validity or propriety of the modified consent decrees at any level of these proceedings.

Thus, this case does not involve the power of a district court to impose a remedy on unwilling defendants. Rather, it raises the narrow issue of the power of the parties to enter into a consensual remedial plan which is subject to judicial enforcement, and which was judicially enforced without opposition from the original parties. As with the consensual agreement in Weber, no provision of law forbids the implementation of such a remedial decree, despite its temporary collateral effect on an existing seniority system.

A. Apart from the judicial findings of past discrimination, the central fact in this case is that the proportionate layoff plan was a product of judicial enforcement of a series of mutually agreed upon

consent decrees. Since a consent order may be construed by looking to "the circumstances surrounding the [consent] order and the context in which the parties were operating," and may be enforced "without reference to the legislation the [plaintiff] originally sought to enforce," United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 243 (1975), and since a court is empowered to modify a decree in adaption of changed conditions particularly where the original decree has not been satisfied, United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), the proportionate layoff plan in the modified decrees must be upheld since it "served to effectuate" rather than "to thwart the basic purpose of the original consent decree[s]," Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942).

B. Whether the proportionate layoff plan is viewed as an unopposed modification of the consent decrees, as the embodiment of a negotiated agreement to remedy past racial wrongs, or as a court imposed bar to the nullification of necessary judicial remedies for past discrimination, it was lawful under Title VII. As in Weber, 443 U.S. at 208-09, the plan advanced the basic purpose of Title VII while not unnecessarily trammeling the interests of white employees since it was a racially proportionate temporary plan which did not require the replacement of white employees with new minority hirees and did not act as a bar to the advancement of whites.

C. From whichever of the foregoing perspectives the proportionate layoff plan is viewed, it satisfied the strict constitutional standards of Regents of the University of California v. Bakke,

438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), since the proportionate plan advanced a compelling state interest by protecting the operational needs of public safety departments to provide nondiscriminatory and effective services to all residents of the community; because the plan preserved at least in part the unachieved remedies for judicially determined past discrimination; and because the plan was reasonably used and narrowly tailored to achieve those objectives.

ARGUMENT

I. The District Court Applied the Correct Legal Standards in Approving A Necessary Modification of the Consent Decrees, Especially in the Absence of Opposition From the City of Boston or its Police and Fire Commissioners

Although the consent decrees in these cases were preceded by several years of litigation and by judicial findings of past discrimination against minorities, a central fact in these cases is that the parties

reached a compromise[1/] through the entry of a series of consent decrees. Also central to these cases is the fact that the parties' stated objective in the consent decrees -- requiring the public safety departments to employ blacks and hispanics through affirmative measures until their employment representation was commensurate with the 23%

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1. The nature of a consent agreement, at least one reached prior to trial court adjudications and appellate court affirmances, has been aptly described by this Court:

> The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971); see also, United States v. ITT Continental Baking Co., 420 U.S. 223, 235 (1975). Of course here, where the public safety departments' liability had already been determined and affirmed, the plaintiffs' risks were relatively minimal while the departments' risks -- particularly the financial risks of being subject to a back-pay remedy, were correspondingly substantial.

minority representation in the community -- had not been achieved at the time of the unanticipated financial crisis which precipitated unforeseen layoffs; and the fact that neither the City of Boston nor its Police or Fire Commissioners opposed the modified consent decrees at issue in this case.

These central facts in many respects place the modified consent decrees here on an even stronger ground than was the race conscious numerical program upheld by this Court in United Steelworkers of America v. Weber, 443 U.S.193 (1979). First, the objective of the parties to these consent decrees was virtually identical to the employer's objective in adopting the numerical program upheld in Weber. Similar to the manner in which the Kaiser Aluminum & Chemical Corp. in Weber sought to limit its financial back-pay liability by imple-

menting prospective numerical relief, the public safety departments here actually avoided all financial risk by entering into consent decrees which required prospective numerical relief. See supra at 9 n.1.

Second, the voluntary relief in Weber and the consent decree relief here are examples of "private ordering" which are subject to a wholly different standard of review than would be applied to a remedy imposed upon a recalcitrant party. In approving the prospective relief in Weber, the Court was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation." 443 U.S. at 200. Here, because "consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the [plaintiffs] originally sought to enforce."

United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). Moreover, in determining whether a court abused its power in modifying a consent decree, "the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree." Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942).

A. At the outset, there simply is no question that a court is empowered to enforce its decrees through specific performance or further injunctive relief, as well as to enforce its decrees through modification so as to effectuate the decrees in light of unanticipated events.

1. As stated by Justice Jackson nearly a century ago: "it is well settled that a court of equity has jurisdiction to

carry into effect its own orders, decrees, and judgments." Root v. Woolworth, 150 U.S. 401, 410 (1893). In fact, it "is well settled" that a federal court is empowered not only to enforce its decrees but also "to secure or preserve the fruits and advantages of a judgment or decree," Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), even if preservation of those fruits and advantages requires an injunction against state proceedings inconsistent with the decree, id.; see also, Dugas v. American Surety Co., 300 U.S. 414, 429 (1936) (approval of a federal court injunction against inconsistent state proceedings as within "the power of a federal court to protect its jurisdiction and decrees").

2. There similarly is no question that a federal court is empowered to modify a decree both to take into account

previously unforeseen conditions as well as to achieve the objectives originally sought by the decree. As Justice Cardozo wrote for the Court: "We are not doubtful of the power of a court of equity to modify an injunction in adaption of changed conditions though it was entered by consent." United States v. Swift & Co., 286 U.S. 106, 114 (1932). This principle, Justice Cardozo pointed out, is unaffected by the absence in the consent decree of any mention of future modification:

> If the reservation had been omitted, power there still would be by force of principles inherent in the chancery. A continuing decree of junction directed to events to come is subject always to adaption as events may shape the need.

Id. These principles, this Court subsequently held in its unanimous decision in United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), apply with even greater vitality where it is the plaintiffs who seek

modification of a decree whose objectives have not yet been satisfied. In fact, where the objectives have not yet been achieved, "the District Court should modify the decree so as to achieve the required result with all appropriate expedition." Id. at 252 (emphasis added).[2/]

3. Finally, in construing a consent order for enforcement purposes, this Court has made clear that the courts should look not only to the language of the decree but also to "the circumstances surrounding the order and the context in which the parties were operating." United States v.

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2. The district court's power to modify is, of course, enhanced where, as here, the primary opposing parties do not object to the modification. Thus, when plaintiffs request a court to modify a consent decree to take account of unforeseen changed circumstances and the primary opposing parties do not object, the court's power is at its apogee. In a real sense, the court acts, not as a lawgiver imposing a remedy on unwilling defendants, but as a facilitator, acting to codify and implement the shared goals of the parties.

ITT Continental Baking Co., 420 U.S. 223, 243 (1975). Moreover, as we have already pointed out, the courts "need not, however, determine whether" the underlying statutes under which the litigation was initially brought "would permit" the enforcement sought "[s]ince a consent decree or order is to be construed for enforcement purposes basically as a contract." Id. at 238.

B. In employment discrimination litigation -- where this Court[3] as well as the lower federal courts[4] have expressed a distinct preference for voluntary resolution of disputes, and where disputes accordingly are frequently resolved through the entry of

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3. See, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

4. See, e.g., the list of Fifth Circuit cases cited in United States v. Miami, 614 F.2d 1322, 1331-32 (5th Cir. 1980), modified en banc, 664 F.2d 435 (5th Cir. 1981); Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

consent decrees -- the courts in general, like the courts below, have been mindful of the foregoing principles in protecting the integrity of consent decrees.

1. In contexts similar to that here, where the decrees have an impact on the expectations of white workers, not only have the courts rejected subsequent third-party challenges to the original decrees as impermissible collateral attacks,[5/] but the courts have also carefully weighed the competing rights and expectations, and generally enforced the consent decrees through modifications thereof and through supplemental orders in order to protect the integrity of the decrees in changed condi-

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5. See, e.g., Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982); Dennison v. Los Angeles, 658 F.2d 694 (9th Cir. 1981); Prate v. Freedman, 430 F. Supp. 1371 (W.D.N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa.), aff'd, 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

tions, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982) (modification barring disproportionate layoffs in view of unanticipated layoffs on the basis of seniority which would have eviscerated the minority employment gains made under the objectives of the consent decree); Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) (same); Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (7th Cir. 1979) (modification suspending a civil service rule which unexpectedly obstructed the minority hiring objectives of the consent decree); EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) (supplemental order requiring more expeditious hiring and promotion of minorities and women, requiring the hiring and promotion exclusively of minorities and women into specified job classifications, and providing for an affirmative action override of certain

collective bargaining agreements); Bolden v. Penn. State Police, 73 F.R.D. 370 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978) (modification increasing the interim minority hiring ratios in view of the defendant's unanticipated failure to make progress toward the minority employment goal in the consent decree).

2. As in the foregoing cases, the trial court here was mindful of this Court's rulings empowering the trial court to enforce through modification the integrity of the decrees in these cases. In fact, as the trial court found in these cases, since the unanticipated straight seniority layoffs "would nullify" the remedial consent orders, "modification of those prior remedial orders through entry of the within order is necessary to prevent that consequence." 522 F. Supp. at 877.

C. In sum, the courts in these cases correctly perceived that the public safety departments had escaped financial liability by agreeing to prospective relief in the judicially enforceable consent decrees, and that they should not be totally excused from their contract because of unforeseen economic conditions. In fact, the reasonableness of the trial court's accommodation -- restraining only disproportionate layoffs of minority officers rather than restraining all minority layoffs -- appears to have been recognized by the contractually bound public safety departments who, possibly in recognition of their operational needs of providing public safety services to all residents of the Boston community, neither opposed the enforcement modification in the lower courts nor oppose it in this Court.

Enforcement of the decrees, regardless of Title VII law and of equal protection

principles, was entirely reasonable and must be affirmed since it served to effectuate rather than to thwart the basic purpose of the existing consent decrees.

II. The Modified Consent Decrees Did Not Violate Title VII

The modified consent decrees at issue are most properly viewed as necessary and unopposed modifications of existing consent decrees and, as such, they are clearly valid for the reasons just stated. It is possible, however, to view the modified decrees in two other ways: as the embodiment of a negotiated agreement between plaintiffs and the employer defendants; or as a judicially imposed remedy for past discrimination. Viewed from the legally more difficult latter perspective, the decrees must comply with -- and they did comply with -- both the restrictions on race-conscious remedial plans set forth in Weber, 443 U.S. 193, and the statutory limitations in Title VII.

A. The Modified Consent Decrees Satisfied the Guidelines for Race Conscious Affirmative Action Plans Established in Weber

In Weber, this Court upheld a voluntary race-conscious affirmative action plan designed to redress the effects of past racial discrimination despite its adverse effect upon pre-existing seniority expectations. The Court upheld the race-conscious plan in Weber because: (1) the purpose of the plan mirrored the purpose of Title VII itself; and (2) the plan did not unnecessarily frustrate the expectations of white employees since: (a) it did not require the discharge of white employees to be replaced with new minority hirees; (b) it did not create an absolute bar to the advancement of white employees; and (c) it was a temporary measure. 443 U.S. at 208-09.

The race-conscious plan embodied in the modified consent decrees fell squarely within the Weber guidelines.

1. The modified consent decrees unquestionably served the purposes underlying Title VII since the "need to break down old patterns of racial segregation and hierarchy," Weber, 443 U.S. at 208, is even more apparent here given the explicit judicial findings of racial discrimination which preceded the decrees.[6/] Indeed, the legacy of proven discrimination in hiring public safety officers in Boston suggests that a failure to have approved the modified decrees would have placed the district court in the untenable position of reinforcing the very discrimination it had condemned.

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6. Justice Blackmun's suggestion of an "arguable violation" standard as prerequisite to race-conscious relief highlights this recognition of the greater justification for such measures where the inference of an employer's prior discrimination is more compelling. See Weber, 443 U.S. at 209-16 (Blackmun, J., concurring); see also, Bakke, 438 U.S. at 366 n.42 (opinion of Brennan, J., with White, Marshall and Blackmun, J.J., concurring in part and dissenting in part) ("We agree that reversal in this case would follow a fortiori had Davis been guilty of invidious race discrimination.").

2. Nor did the modified consent decrees unnecessarily trammel the legitimate expectations of even the most "innocent" white employees since the seniority expectations affected by the remedial decrees were, in a real sense, attributable to the unfair advantage historically afforded to whites by the unlawful and long-standing exclusion of minorities from the employee pool. Cf. Fullilove, 448 U.S. at 484-85 (opinion of Burger, C.J., with White and Powell, JJ.) ("Although we may assume that the complaining parties are innocent of any discriminatory conduct . . . non minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities"); Bakke, 438 U.S. at 365 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) ("Where an employer has violated an anti-discrimination law, the expectations of non-minority

workers are themselves products of discrimination and hence 'tainted' and therefore more easily upset") (citations omitted). In seeking to assure that layoffs did not fall with disproportionate effect on newly hired minority workers, the district court merely protected the original remedial consent decrees against the lingering effects of decades of unlawful discrimination. See Neuborne, Observations on Weber, 54 N.Y.U.L. Rev. 546, 549 (1979).

a. The modified decrees did not require the discharge of any white employees; in fact, the decrees did not mandate or otherwise suggest the layoff of anyone, see Tangren v. Wackenhut Services, 480 F. Supp. 539, 549 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S.Ct. 1771 (1982), much less the replacement of white employees with new minority hirees. Given the myriad alternatives open to public employers such as the City of Boston,

the fact that the pain of layoffs would be borne by whites as well as minorities often produces an almost magical infusion of funds, rendering layoffs unnecessary. Indeed, once the courts below made it clear that layoffs could not fall with disproportionate effect on minority employees, the Massachusetts Legislature discovered the funds to rehire every employee.

b. The decrees also did not interject any bars or obstacles, absolute or otherwise, to white advancement. Instead, as the First Circuit below properly observed, "[a]ll they [did was] preserve the status quo at a 14.7 percent minority ratio for firefighters and an 11.7 percent for police . . . [a]gainst a background of a present 30 percent minority population in Boston," 679 F.2d at 977.

c. Finally, the decrees were temporary, and certainly were not -- contrary to petitioners' assertions -- attempts permanently to maintain racial balance, or to award permanent constructive seniority. In fact, with the passing of the fiscal crisis which precipitated the layoffs, there for some time have been no laid-off officers at all.

Thus, since the modified decrees were necessary to effectuate the basic purpose of Title VII and were narrowly tailored to remedy proven racial discrimination with minimum interference with the expectations of white employees, they comfortably met the Weber guidelines.[7/]

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7. This conclusion is reinforced by the judgment of each of the courts of appeals that has addressed the post-Weber legality of temporary race-conscious relief, whether such relief came about as an entirely voluntary measure, Tangren, 658 F.2d 705; in attempted compliance with Executive Order 11246,

[footnote 7 continued on next page]

B. Judicial Acceptance of the Modified Consent Decrees Was Not Prohibited by Section 703(h)

Even if the modified consent decrees here are viewed solely as a judicial exercise of remedial power subject to Title VII constraints, the decrees were lawful despite their impact upon seniority expectations.

Petitioners, by asserting that the relief here is barred by § 703(h), obfuscate a distinction this Court made painstakingly plain in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), and in Int'l Bhd. of

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[footnote 7 continued from previous page] Sisco v. J.S. Alberici Const. Co., 655 F.2d 146 (8th Cir. 1981), cert. denied, 102 S.Ct. 1485 (1982); as a result of a court-ordered remedy for prior proven discrimination, Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (1982); or in the context of modification of consent decrees, whether or not preceded by prior judicial findings of discrimination, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982) (no prior findings of discrimination); Brown v. Neeb, 644 F.2d 551 (6th Cir. 1982) (prior findings as to police department but not as to fire department).

Teamsters v. United States, 431 U.S. 324 (1977), between the exemption from Title VII's prohibitions accorded bona fide seniority systems in § 703(h) and the federal courts' equitable and remedial authority to fashion and approve relief affecting aspects of seniority. Section 703(h) is "only a definitional provision," delineating "which employment practices are illegal and thereby prohibited and which are not." Franks, 424 U.S. at 758.

Accordingly, under § 703(h), maintenance of a bona fide seniority system is in itself legal, even though it may perpetuate the effects of past illegal discrimination through its disparate distribution of seniority benefits, Teamsters, 431 U.S. at 353-54; and only direct challenges to the legality of such seniority systems -- an approach never pursued in the instant cases -- are precluded by § 703(h). However,

"[s]ection 703(h) certainly does not . . . qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g)." Franks, 424 U.S. at 758.

C. The Modified Consent Decrees Were Authorized Under Title VII's Remedial Provision, § 706(g)

Even viewing the modified consent decrees here, once again, solely as an exercise of judicial power subject to Title VII's constraints, the decrees were lawful both because race-conscious affirmative relief is expressly authorized by § 706(g) and because the temporary relief here was not an award of permanent "make whole" constructive seniority.

1. This Court has frequently recognized the broad congressional grant of power given to federal courts under §

706(g). See, e.g., Teamsters, 431 U.S. at 364; Franks, 424 U.S. at 770; Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Underlying this recognition is both Congress' express ratification of the use of race-conscious remedies not merely limited to the identifiable victims of an employers' racial discrimination but designed to benefit minorities as a group, and the consistent approval of this remedial power by the courts of appeals.

a. In 1971 and 1972, when Congress debated the propriety of race-conscious remedies under Title VII and ultimately amended and strengthened Title VII, Congress not only approved the then-existing case law in which the courts had imposed broad race-conscious remedies, but also expressly rejected amendments to Title VII which would have prevented the imposition

of race-conscious relief. See, e.g., the discussion of the 1971-72 legislative history of § 706(g) set forth in United States v. Int'l Union of Elevator Const'rs, 538 F.2d 1012. 1019-20 (3d Cir. 1976); see also, EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 176-77 (3d Cir. 1977) (discussion of the 1971-72 legislature history and of 1964 legislative history of § 706(g) and particularly of that section's last sentence), cert. denied, 438 U.S. 915 (1978). In view of this conclusive legislative history, which we have previously cited to this Court,[8/] there can be little doubt about the permissibility of broad race-conscious remedies under § 706(g).

b. Consistent with this legislative history, those courts of appeals

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8. See Brief of the American Civil Liberties Union and of the Society of American Law Teachers, Amici Curiae, 74-89, filed in Weber, 443 U.S. 193 (1979).

which have viewed the § 706(g) authority issue raised here by petitioners and by the United States as amicus curiae have uniformly and correctly held that § 706(g) authorizes the imposition of broad race-conscious affirmative remedies.[9/]

2. In view of the remedial authority granted by § 706(g), the temporary race-conscious relief contained in the modified consent decrees here -- even if viewed as court imposed -- did not run afoul of this Court's allowance in Franks and Teamsters of permanent "make whole" relief only to identifiable victims of an employer's discrimination. The minority

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9. See the cases collected in United States v. Int'l Union of Elevator Const'rs, 538 F.2d 1012, 1020 (3d Cir. 1976), and in United States v. Chicago, 549 F.2d 415, 436-37 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); see also, e.g., United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974); United States v. Local No. 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973).

employees here, even those who are unquestionably entitled to such extraordinary permanent measures, sought and received only temporary, proportionate relief plainly within the broad scope of § 706(g).

The partial, prospective, and temporary relief here was entirely unlike the complete, retroactive, and permanent make-whole relief of competitive status seniority, benefit seniority, and back pay[10/] which was

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10. As this Court recognized in Franks, employees entitled to a "make-whole" remedy by virtue of an employer's discrimination may receive extraordinary relief, including awards of "competitive-status" seniority (allocating scarce benefits among competing employees); "benefit" seniority (awarding non-competitive benefits earned over time under an employment contract) and back pay retroactive to the date of the discriminatory decision. 424 U.S. at 764-67. In addition to relief affecting layoff structure, awards of "competitive-status" seniority permanently redistribute priorities affecting promotions, transfers, demotions, rest-days, shift assignments, job and travel assignments, vacation, scheduling, training opportunities, working conditions, overtime opportunities, parking privileges and the like. Id. at 766-67.

"Benefit" seniority requires substantial payouts of benefits by the employer including pension benefits, health benefits, fringe benefits, unemployment insurance, vacation time and sick leave, id., in addition to direct monetary back-pay payments.

sought and allowed in Franks and Teamsters. The mere fact that this very limited relief had an impact on seniority -- a proportional impact designed only to prevent nullification of the plainly authorized numerical hiring relief -- did not place it in contravention of § 706(g).

In fact, not only was the proportional relief here consistent with Congress' broad grant of remedial authority under § 706(g), see supra at 30-33, but it also was consistent with § 703(h) since "the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g)," Franks, 424 U.S. at 758-59. Moreover, the limited relief here certainly was entirely consistent with Congress' power to provide race-conscious numerical remedies to unidentified victims of past exclusionary practices. Fullilove, 448 U.S. 448; Bakke, 438 U.S. at

302 n.41 (opinion of Powell, J.); id. at 363-64 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

III. The Modified Consent Decrees Did Not Violate Equal Protection of the Laws

As we have noted, it is possible to view the modified consent decrees from three perspectives: as necessary modifications of existing consent decrees, subject to extremely relaxed standards of review; as the embodiment of a negotiated agreement to remedy past racial wrongs, subject to the guidelines for voluntary activity set forth in Weber; or as a court-imposed remedy for past racial discrimination, subject to the limitations set forth in Bakke and Fullilove. Even when viewed against the most stringent standard of constitutional review, the proportionate layoff plan was constitutional both because it satisfied

the compelling operational needs of providing effective public safety services to the entire community, and because it was a permissible remedial measure designed to redress judicially determined unlawful discrimination in hiring.[11/]

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11. Because the police case was filed and litigated to a consent judgment under 42 U.S.C. § 1981 and § 1983 (and not under Title VII), and since the fire case similarly was filed and litigated through to a series of consent decrees under 42 U.S.C. § 1981 and § 1983 (with only the United States invoking Title VII in its separately filed but later consolidated lawsuit), whatever Title VII constraints might arguably apply to the formulation of a remedy in a pure Title VII case, but see supra at 28-36, no such statutory constraints apply to the modified consent decrees in this § 1981 and § 1983 litigation.

The courts are broadly empowered in § 1983 lawsuits to award all appropriate equitable and legal remedies, Carey v. Piphus, 435 U.S. 247 (1978), and in § 1981 lawsuits similarly to award all appropriate "equitable and legal relief, including compensatory and, under certain circumstances, punitive damages," Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

The enactment of Title VII did not and does not affect the broader relief available in § 1981 and § 1983 lawsuits: "the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." Id. at 459. This applies to

[footnote 11 continued on next page]

A. Numerical Remedies, as Explained in Bakke and Fullilove, May Be Used to Satisfy a Substantial or Compelling Government Need as Well as to Remedy the Effects of Past Discrimination

1. This Court recognized in Bakke, 438 U.S. 265, that a race-conscious numerical program would be constitutional so long as it could be justified by the operational needs of government. Four members of this Court in Bakke expressly held that such a program would be constitutional so long as it served "important government objectives and [was] substantially related to achievement of those

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the broader availability not only of legal remedies but also of equitable remedies: for example, "a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII." Id. at 460. In sum, the broader § 1981 and §1983 "remedies . . . are separate, distinct, and independent" from those available under Title VII. Id. at 461; cf., Carlson v. Green, 446 U.S. 14 (1980) (plaintiff may pursue broad constitutional remedies without being limited to only the statutory remedies in the Federal Tort Claims Act).

objectives. Id. at 359 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). A fifth member of the Court, Justice Powell, "assumed that in some situations a [government's] interest in facilitating the health care of its citizens [here, the public safety of its citizens] is sufficiently compelling to support the use of a suspect classification." Id. at 310.

2. The Bakke Court also recognized that race-conscious remedies are permissible to redress past discrimination, since it had long "been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance." Id. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (emphasis added); see also, id. at 300-302 (opinion of Powell, J.).

In fact, as a result of Bakke and Fullilove, 448 U.S. 448, numerical remedies, such as the proportionate layoff plan here, may encompass nonvictims of past discrimination, and even may be used in the absence of any adjudicated past discrimination.

a. Four members of this Court in Bakke held that a strict numerical program is justifiable and constitutional in certain circumstances so long as it is based on the "articulated purpose of remedying the effects of past societal discrimination." 438 U.S. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). In reaching this result, the Justices pointed out that prior Supreme Court decisions supported the conclusion that the minority individuals benefiting from such a numerical program need not "have been individually discriminated against" as "it is enough that each recipient is within a general class of persons likely to have

been the victims of such discrimination." Id. at 363. Additionally, numerical programs need not be preceded by or premised upon "judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made," and since any "requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self defeating" and contrary to our "jurisprudence." Id. at 364.

Although disagreeing with the conclusion that a strict numerical program could be constitutionally justified as a remedy for past societal discrimination, Justice Powell in his separate opinion in Bakke agreed that judicially or administratively approved numerical programs could properly encompass nonvictims of the past discrimination and that such programs need not be based

upon judicial findings of past discrimination. Relevant to both points of agreement is Justice Powell's express reliance on the administratively "fashioned remedies," id. at 301-302, approved by the courts of appeals in Contractors Ass'n of Eastern Penn v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), decisions approving administratively imposed remedies which widely encompassed nonvictims and which in fact were premised on no express administrative or judicial findings of past discrimination. As to the permissible scope of remedial measures, Justice Powell also cited with approval, Bakke at 301, two cases -- brought against public safety departments solely under § 1981 and § 1983 -- in which the courts of appeals expressly

approved court-ordered numerical remedies which included nonvictims of the discrimination: Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); and Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972).[12/]

Subsequent to Bakke, the federal courts of appeals have consistently read Bakke as

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12. In Carter, 452 F.2d 327, the Eighth Circuit en banc expressly acknowledged that there were no identifiable victims of discrimination who would be necessarily involved in the numerical relief. 452 F.2d at 328; see also 452 F.2d at 325-36 (panel opinion). Since this was not controlling in the fashioning of appropriate equitable relief to remedy past racial discrimination, the en banc court concluded that the Minneapolis Fire Department should thereafter hire one minority for every two whites hired until the overall hiring goal was met. 452 F.2d at 331.

The Second Circuit in Bridgeport Guardians, 482 F.2d 1333, approved similar hiring ratios which also included nonvictims of the discrimination practiced by the Bridgeport Police Department. 482 F.2d at 1339-41.

authorizing the use of numerical programs encompassing nonvictims of discrimination whether the programs were undertaken voluntarily to remedy minority underrepresentation,[13] undertaken in response to administrative findings of discrimination,[14] or judicially ordered to remedy past discrimination.[15]

b. Confirming the correctness of the conclusions set forth in Bakke, the Court two years later in Fullilove, 448 U.S. 448, upheld the constitutionality of a numerical set aside for minority business enterprises in government contract-

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13. E.g., Local 35, IBEW v. Hartford, 625 F.2d 416, 422-24 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1981).

14. E.g., Valentine v. Smith, 654 F.2d 503, 507-09 (8th Cir. 1981), cert. denied, 102 S.Ct. 972 (1982); Caulfield v. Bd. of Educ. of City of New York, 632 F.2d 999 (1980), cert. denied, 450 U.S. 1030 (1981).

15. E.g., Firefighters Institute for Racial Equality v. St. Louis, 588 F.2d 235, 239 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979); Morrow v. Dillard, 580 F.2d 1284, 1292-94 (1978).

ing, fully recognizing that the numerical program was based upon minority underrepresentation rather than upon any judicial, administrative or legislative findings of past discrimination against minority contractors.[16/]

Paralleling their views in Bakke, Justices Marshall, Brennan and Blackmun held in Fullilove that the MBE set aside was "clearly constitutional" since it served to remedy the reality that minority contractors had "received a disproportionately

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16. Although the two plurality opinions in Fullilove which provided the majority judgment upholding the MBE numerical program do make reference to correcting past discrimination in the construction industry, 448 U.S. at 453-92 (opinion of Burger, C.J., with White and Powell, JJ.), and 448 U.S. 517-22 (opinion of Marshall, J., with Brennan and Blackmun, JJ.), the dissenting opinion of Justice Stewart joined by Justice Rehnquist accurately points out that there was absolutely "no evidence that Congress [had] in the past engaged in racial discrimination in its disbursement of federal contracting funds." 448 U.S. at 528; see also, 448 U.S. at 528 n.8 ("The legislative history of the MBE provision itself contains not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination.").

small amount of public contracting business." Id. at 520.

Chief Justice Burger, joined by Justices White and Powell, employed a similar analysis in Fullilove while also pointing out that the numerical program was "a strictly remedial measure," a "remedy that functions prospectively, in the manner of an injunctive decree." Id. at 481.

B. The Modified Consent Decrees Embodying the Proportionate Layoff Plan Were Constitutionally Justified

Under the applicable constitutional tests,[17/] the proportionate layoff plan in

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17. See supra at 38-39. In addition there should be an inquiry as to whether a numerical program "stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives." Bakke, 438 U.S. 265, 373-74 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.); see also, Fullilove, 448 U.S. 448, 517-22 (opinion of Marshall, J., with Brennan and Blackmun, JJ.). A similar test, announced by three Justices in Fullilove, requires that a reme-

[footnote 17 continued on next page]

the modified consent decrees fulfilled substantial and compelling governmental public safety objectives in addition to preserving in part the unachieved prior remedies for judicially determined past discrimination; they also were narrowly tailored and reasonably used; and they stigmatized no discrete group or individual.

1. Not only did the modified consent decrees serve to remedy undisputed past discrimination,[18] but they fulfilled

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[footnote 17 continued from previous page] dial program be "narrowly tailored to the achievement of [the remedial] goal." 448 U.S. at 480 (opinion of Burger, C.J., with White and Powell, JJ.); see also, Justice Powell's opinions in Bakke, 438 U.S. at 305, 314-15, and in Fullilove, 448 U.S. at 498-99.

18. Petitioners' argument, based on Washington v. Davis, 426 U.S. 229 (1976), and on Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977), that the trial court was powerless to modify the disproportionate layoffs because the original findings of past discrimination in these § 1981 and § 1983 cases had not included findings of intentional discrimination, is frivolous. Apart

[footnote 18 continued on next page]

the compelling governmental needs of achieving at least partially integrated

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[footnote 18 continued from previous page]

from the fact that race-conscious numerical measures may be adopted or imposed without judicial intervention, see discussion supra at 39-46, petitioners overlook both the consent decrees and the evidentiary record in these cases.

The First Circuit below correctly rejected petitioners' argument based on the indisputable fact that "the pattern of relief which the modification in the decrees seek to preserve was conclusively established prior to [Washington v. Davis and Arlington Heights]." 679 F.2d at 971. Like the First Circuit, and like the Sixth Circuit in another § 1981 and § 1983 case, Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979), we find it "hard to understand how these decisions [Washington v. Davis and Arlington Heights] could be applied to a case involving a consent decree" since, regardless of evidentiary matters "the parties agreed that certain steps should be taken;" and since, "whatever may have been the understanding of the parties with respect to the requirements for proving a constitutional violation at the time of the decree, they all agreed upon a course of conduct to bring about a better representation of minority groups on the Toledo police force," and "this agreement was solemnized at their request by entry as an order of the district court." 601 F.2d at 919. See also Bolden v. Penn. State Police, 73 F.R.D. 370, 371-72 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978); cf., Dawson v. Pastrick, 600 F.2d 70, 76 (7th Cir. 1979) ("To allow post-approval changes or clarifications in the law to upset a settlement would be contrary to the established policy of encouraging settlements and

[footnote 18 continued on next page]

public safety forces in a racially mixed urban setting. Bitter experience has

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frequently would allow a party to back out of a bargained-for position after agreement had been reached.").

Even if the consent decrees did not exist in these cases, the First Circuit below pointed out that it was "by no means clear" that its previous liability decisions "in the police and fire cases should have been different had they been decided after Washington v. Davis and Arlington Heights." 679 F.2d at 971. In fact, there was considerable evidence in the original trial court records from which the courts could have inferred from the totality of the circumstances -- based upon the subsequent intent standards -- that the discrimination practiced against minorities by the public safety departments had been purposeful. For example, there had been an historic exclusion of minorities from the public safety departments resulting in severe racial imbalance, 334 F. Supp. at 935 (police case); 371 F. Supp. at 514 (fire case); and racial "imbalance is often a telltale sign of purposeful discrimination," for "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired," Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n. 20 (1977). Additionally, the selection examinations had a decidedly discriminatory impact, 334 F. Supp. at 941-42 (police case); 371 F. Supp. at 513-14 (fire case); and "[i]t is also not infrequently true that the discriminatory

[footnote 18 continued on next page]

taught us that all white police and fire departments cannot function effectively in a racially mixed urban environment. Where, as here, a race-conscious remedial plan was necessary to prevent the re-segregation of Boston's police and fire departments, the court's modified decrees were well within constitutional standards.

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impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds," Washington v. Davis, 426 U.S. 229, 242 (1976). Further, at least some of the "discriminatory consequences" "were foreseeable," 334 F. Supp. at 943 (police case); and "proof of foreseeable consequences is [another] type of quite relevant evidence of racially discriminatory purpose," Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n. 9 (1979).

In sum, even if the original police and fire cases had been tried under intent standards, it is by no means clear that the courts' liability decisions would have been any different. In the final analysis, however, this speculation is irrelevant since the original decrees were consent decrees, and since the original decrees in any event are not now subject to collateral attack, see supra at 17 n. 5.

a. The First Circuit here quite properly found that "[a]n important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent," and also quite correctly observed that the court did "not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." 679 F.2d at 977.

The compelling operational needs for greater minority employment by public safety departments, the Sixth Circuit recently observed, "is not simply that blacks communicate better with blacks," but:

> Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); quoted with approval by the Fourth Circuit in Talbert v. Richmond, 648 F.2d 925, 931 (4th Cir. 1981), and also by the First Circuit in these cases, 679 F.2d at 977.

The reality of these operational needs of urban public safety departments has been relied on increasingly by the federal courts subsequent to Bakke as a substantial or compelling justification for race-

conscious employment programs.[19/] In fact, even prior to Bakke two courts of appeals held that the operational needs of public safety departments provided at least part of the justification for

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19. See Talbert v. Richmond, 648 F.2d 925, 928 (4th Cir. 1981) (Judge Butzner, with Judges Field and Hall) (approving "the operational needs of the police department [of] achieving diversity among the officers" as particularly "important to effective law enforcement in a city whose population was approximately 50% black"); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 678-80, 695-96 (6th Cir. 1979) (Judge Lively, with Judges Celebrezze and Merritt) (relying on the operational needs of increasing the employment of minority officers); Baker v. Detroit, 483 F. Supp. 930, 995-1000 (E.D. Mich. 1979) (Judge Keith) (citing instance after instance in which the presence of minority officers actually decreased racial tension and prevented inflamatory incidents while improving community cooperation and increasing the level of effective crime prevention); Doores v. McNamara, 476 F. Supp. 987, 991 (W.D. Mo. 1979) (Judge Clark) (finding that in Kansas City "there had been a serious race riot in 1967," "that this riot might have been prevented had there been a more representative representation of minorities [particularly blacks] on the police force," and "that the efficiency of any metropolitan police force and peaceful solution within such area would be greatly enhanced by having as near as possible the same percentage of minorities on the police force as that which they represented in the community population").

approving race-conscious numerical measures.[20]

b. This recognition of the close correlation between the effective delivery of public safety services and the employment of significant numbers of minority public safety officers in our nation's urban centers is not just a judicial recognition nor is it a recognition of recent vintage. Instead, as summarized by the Sixth Circuit in Detroit Police Officers Ass'n, 608 F.2d at 695:

> It is based on law enforcement experience and a number of studies conducted at the highest levels. E.g., National Advisory Commission on Criminal Justice Standards and Goals, Police (1973); National Commission on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Insure Domestic Tranquility (1969); Report of the National Advisory Commission on Civil Disorders

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20. NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Bridgeport Guardians v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

(1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See To Establish Justice, supra at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. Report on Civil Disorders, supra at 301; Task Force Report: The Police, supra at 144-45, 167; Police, supra at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." Report on the Causes of Crime 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the [Detroit Police Department] defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be

> representative of the community as a whole. Task Force Report: The Police, supra at 167.

This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:

> If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions. Id. at 172.

The presence of a mostly white police force in minority communities can be a "dangerous irritant" which can trigger, as it did in Detroit in 1967, a violent response. Report on Civil Disorders, supra at 315, 120; see also id. at 84-108 (chronology of events of 1967 Detroit civil disorders).

The operational needs conclusions reached in the foregoing reports have been echoed in numerous other reports, including the many reports issued by the U.S. Commission on Civil Rights after studying such matters as public safety practices in general, the 1980 Miami riots, and the violence surround-

ing school desegretation in Boston.[21]

2. In addition to its compelling justifications, the numerical plan here was necessary, reasonably related to its objective, and narrowly tailored. It was entirely "necessary," as the trial court found, "to

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21. Based upon its study of the operational needs of public safety departments in general, the Commission in 1980 concluded that a "police force must reflect the racial and ethnic composition of the community it serves." U.S. Comm'n on Civil Rights, Police Practices and the Preservation of Civil Rights, 10 (1980). See also, e.g., U.S. Comm'n on Civil Rights, Confronting Racial Isolation in Miami (1981); U.S. Comm'n on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility (1975).

In addition to the general conclusions in the latter report, the Commission also pointed out that: "By its actions, the Boston Police Patrolmen's Association has made its opposition to school desegregation clear to the community. The effect of that public position is equally clear. No police force can function effectively in crisis situations unless it meticulously avoids a position of advocacy directly opposed to the law." Id. at 109-10. In fact, at the very time that effective and even-handed law enforcement was an absolute necessity, the Boston Police Patolmen's Association "membership attempted to avoid the appearance of favoring court ordered school desegregation by ignoring their law enforcement and public safety responsibilities." Id. at 113.

prevent" racially disproportionate layoffs which "would nullify the Court's prior remedial orders and frustrate the intent of those orders," 522 F. Supp. at 877, orders which in fact had been mutually agreed upon consent orders.

The proportionate layoff plan was also both reasonably related to its objective and narrowly tailored. The court did not restrain the layoff of all minority public safety officers, nor did the court restructure the seniority system. Instead the court only ordered that if the departments actually effected temporary layoffs, the layoffs could not be seniority-based[22/]

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22. The fact that the trial court's modification of the consent decrees temporarily suspended the effect of an otherwise valid state statute is not of constitutional significance. In order to effectuate a remedial decree, a federal court is fully empowered to invalidate a contrary state statute, Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958), much less to order the "temporary suspension of an otherwise valid state statute," Costello v. Wainwright, 430 U.S. 325, 326 (1977).

but instead had to be racially neutral so as to retain the percentage (but not the number)of minority officers then on the forces.

In modifying the otherwise racially disproportionate layoffs, not only was "race . . . reasonably used in light of the [remedial] objectives," Bakke, 438 U.S. at 373-74 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.), but the racial modification was "narrowly tailored to the achievement of that goal," Fullilove, 448 U.S. at 480 (opinion of Burger, C.J., with White and Powell, JJ.).

3. The proportionate layoff plan neither "stigmatize[d] any group or . . . single[d] out those least well represented in the political process to bear the brunt of [this] benign program." Bakke, 438 U.S. at 361 (opinion of Brennan, J., with White,

Marshall and Blackmun, JJ.). There simply was no stigma attributable to any of the officers, either those laid off or those retained, since there was no question whatsoever about the officers' qualifications. Nor can this racially proportionate layoff plan be said to have singled out those least well represented in the political process. To the contrary, the very fact that white officers were temporarily laid off on a proportionate basis may have insured the majoritarian political result that brought an end to all of the temporary layoffs shortly after they had taken effect.

IV. If This Court Approaches These Cases Solely From the Perspective of Economic Loss, The Employer-Defendants, as the Principal Guilty Parties Before the Court, Must Bear Any Economic Burdens Flowing From the Failure of the Consent Decrees

Amici have demonstrated that the modified consent decrees were lawful, whether

viewed as amendments to an existing consent decree; as the embodiment of a negotiated remedial plan; or as a court imposed remedy. By requiring proportionate layoffs, the district court merely assured that the economic loss attributable to the frustration of the remedial provisions of the original consent decrees would be spread equitably across the workforce.

If, however, this Court chooses to approach these cases solely from the perspective of who should bear the economic loss attributable to the failure of the original consent decrees, it is both unnecessary and inappropirate to view the cases as presenting an unavoidable collision between the expectations of white workers and the compelling state interest of achieving racially integrated public safety departments in a racially mixed urban setting. If changed circumstances require

any party before the Court to bear an economic loss, surely that party should be the City of Boston -- the principal guilty party -- rather than innocent minority workers hired pursuant to valid remedial decrees.

It would be an inconceivable resolution of this case to permit the City of Boston -- the guilty party -- to shift the entire economic burden of the failure of the original remedial plan to the very class against whom it had systematically discriminated. The courts below prevented such an unjust result by assuring that layoffs would be proportionately distributed. Predictably, once the pain of layoffs was felt by the politically powerful majority, sufficient funds were discovered to re-hire all employees.

Thus, amici submit that Boston, as a guilty employer, may not seek to shift a disproportionate share of the economic

burden of the failure of the original remedial plan to its minority employees. Rather, as a public employer judicially determined to have been guilty of racial discrimination, Boston must share the economic burdens of dealing with its past racism, either by re-allocating its existing resources or by finding new ones. As the record in this case demonstrates, such a task is made easier when white jobs as well as black jobs are at stake.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: February 7, 1983

Respectfully submitted,

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FEB 7 1983

Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner
v.
BOSTON CHAPTER, NAACP, ET AL.,
Respondents

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner
v.
PEDRO CASTRO, ET AL.,
Respondents

NANCY B. BEECHER, ET AL.,
Petitioners
v.
BOSTON CHAPTER, NAACP, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The underlying question presented by these cases goes beyond the validity of the particular district court orders that are being challenged:

> When there has been a judicial finding of unlawful employment discrimination, does the 14th Amendment to the United States Constitution or Title VII of the 1964 Civil Rights Act categorically prohibit the district court from issuing a remedial order that accords preferential treatment to minorities who are not victims of the unlawful discrimination, or that is contrary to a *bona fide* seniority-based layoff system?

The National Education Association will address this question.

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---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

The National Education Association (NEA) moves this Court for leave to file the accompanying brief *amicus curiae* in support of respondents.

STATEMENT OF INTEREST AND REASONS FOR GRANTING MOTION

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principle objectives of NEA, as set forth in its Charter, is "to elevate the character and advance the interests of" educational employees. Toward this end, NEA and its affiliates engage in collective bargaining and otherwise represent these employees in dealing with their employers regarding terms and conditions of employment.

NEA believes that the seniority principle provides an objective and equitable standard on which to base employment decisions, including decisions regarding layoff. On a policy level, this belief is reflected in various resolutions adopted by NEA's highest governing body, the Representative Assembly; in practice, it is reflected in the efforts of NEA and its affiliates to incorporate the seniority principle into policies establishing terms and conditions of educational employment.

NEA's commitment to the seniority principle is strong, but it is not absolute. NEA believes that there is at least one situation in which a rigid application of the seniority principle does not provide an appropriate basis for making employment decisions and that some compromise in the principle is necessary. This is when, because of racial discrimination, the percentage of minorities in the workforce is significantly below the percentage in the relevant labor market. Although it would be preferable if the effects of this discrimination could be elimi-

nated simply by ending the discriminatory practices and utilizing employment practices that treat people equally regardless of race, this is not always possible. Affirmative action programs, which take conscious account of race, may be necessary to achieve true equal employment opportunity.

NEA's commitment to affirmative action in the above situation likewise is reflected in resolutions of its Representative Assembly, particularly Resolution E-13. After reaffirming NEA's support for seniority and other objective criteria as a general matter, the resolution concludes with a recognition of the fact that it "may be necessary to give preference in the recruitment, hiring, retention and promotion policies to certain racial groups . . . to overcome past discrimination." Pursuant to this resolution, NEA and many of its affiliates have been involved in the development and implementation of affirmative action programs that accord preferential treatment to minorities in various aspects of the employment relationship.

NEA believes that the choice between strict seniority-based employment decisions and decisions that reflect some accommodation of affirmative action is best made voluntarily by the employer and the employee organization through collective bargaining or other forms of dialogue. Where, however, there has been a judicial finding that the underrepresentation of minorities in the workforce is attributable to unlawful discriminatory practices by the particular employer, a federal court should be able to include in a remedial order racial preferences in hiring. Moreover, if necessary to preserve the progress that has been made as a result of such preferences, the court also should be able to accord preferential treatment to minorities when layoffs become necessary. Since this Court is being asked to decide in the instant cases whether a preference of the latter type is permissible under the Fourteenth Amendment to the United States Constitution and Title VII of the 1964 Civil Rights Act, NEA has a substantial interest in their outcome.

NEA has participated in prior cases involving affirmative action programs that accord preferential treatment to minorities in employment and other contexts, including *University of California v. Bakke* and *United Steelworkers v. Weber*. As a result of this participation, NEA has acquired an understanding of the issues presented in the instant cases, and the analysis in its brief *amicus curiae* will be of assistance to this Court in deciding them.

And, finally, because NEA appears to be the only employee organization that seeks to file a brief *amicus curiae* in support of respondents, it can provide a perspective that this Court otherwise would not receive.

CONCLUSION

For the foregoing reasons, NEA's motion for leave to file the accompanying brief *amicus curiae* should be granted.

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Dated: February 7, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-185, 82-246, 82-259

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner

v.

BOSTON CHAPTER, NAACP, ET AL.,
Respondents

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner

v.

PEDRO CASTRO, ET AL.,
Respondents

NANCY B. BEECHER, ET AL.,
Petitioners

v.

BOSTON CHAPTER, NAACP, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the National Education Association (NEA) is set forth in that motion.

SUMMARY OF ARGUMENT

When a district court determines that a public employer has engaged in unconstitutional discrimination in employment, the court's duty is to fashion a remedy that both ends the discrimination and eliminates its effects. Race conscious numerical requirements (hereinafter "racial preferences") are not prohibited by the Constitution and are a necessary component of such a remedy in certain cases. Specifically, racial preferences are sometimes necessary simply to put a stop to the discrimination. In addition, they may be necessary to make clear to minorities that the discrimination has ended and that they will be offered equal opportunity for employment, and to assure to those minorities who are employed a working environment that is free from racial discrimination, tension and harassment. Further, racial preferences serve the societal interest in achieving the ethnic composition of the workforce that would have existed but for the unlawful discrimination. (Section I(A)).

Although the racial preferences that have been sanctioned in employment discrimination cases usually have involved hiring, as opposed to layoffs, the rationale for the hiring remedies also justifies the use of such preferences in layoffs, particularly when necessary "to ensure that [hiring] relief already ordered not be eviscerated by seniority-based layoffs." *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982). To the extent that layoffs present certain special factors, they pertain not to the scope of the district court's remedial power, but to its exercise of discretion in weighing all of the relevant factors. (Section I(B)).

These cases cannot be disposed of without deciding whether racial preferences may be used to remedy unconstitutional employment discrimination on the ground that the district court's original findings of constitutional violations have been undercut by intervening changes in decisional law. Inasmuch as petitioners did not challenge those findings under the procedure provided in Federal

Rule of Civil Procedure 60(b), the findings must be accepted as fully operative for purposes of this proceeding. (Section I(C)).

The language and purpose of Title VII suggest a remedial authority at least as broad as that in constitutional cases. There is no merit to the arguments of petitioners and their supporting *amici* that Section 703(h) of Title VII prohibits the district courts from ever according preferential treatment that is contrary to the operation of a *bona fide* seniority system; or that Section 706(g) bars any remedy that gives a preference to non-victims of the unlawful discrimination.

This Court's decision in *Franks v. Bowman Transportation Co.* makes it clear that the purpose of Section 703(h) is to define what is and is not an unlawful employment practice. That section does not restrict the power of the district courts to fashion an appropriate remedy once unlawful discrimination, independent of the operation of a seniority system, has been found to exist. (Section II(A)).

Section 706(g), on the other hand, *does* govern the remedial power of the district courts, but it does not prohibit preferential remedies benefiting non-victims of the unlawful discrimination. Ample support for this proposition is found in the language of Title VII as originally enacted in 1964, and this was the view taken by the lower federal courts. Any doubt that may have existed regarding the point was conclusively dispelled in 1972 when Congress amended the 1964 statute in a number of respects. The legislative history of the 1972 amendments indicates that Congress was fully aware of the court decisions under the 1964 Act regarding the scope of the district courts' remedial power. It not only approved those precedents, but amended Section 706(g) to broaden the courts' power. (Section II(B)).

And, finally, the Justices of this Court who have spoken to the question—in *Regents of the University of California v. Bakke* and *Fullilove v. Klutznick*—have in-

dicated that remedial orders according racial preferences under Title VII need not be restricted to identified victims of discrimination. This is, moreover, the unanimous view of the lower federal courts. (Section II(C)).

ARGUMENT

I. A JUDICIAL REMEDY FOR UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION MAY INCLUDE RACIAL PREFERENCES DESIGNED TO PROTECT MINORITY EMPLOYEES AGAINST LAYOFFS.

A. Racial Preferences May be Necessary to End Unconstitutional Employment Discrimination or Eliminate Its Effects.

Our analysis begins with two principles of constitutional law established by the decisions of this Court:

First, upon a finding of discriminatory practices in violation of constitutional rights, the district court has the responsibility to fashion a remedy that both will end the discrimination and "eliminate [its] effects." *Milliken v. Bradley*, 433 U.S. 267, 283 (1977). "The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Second, numerical requirements based on race are permissible in formulating a remedy for unconstitutional discrimination. *North Carolina State Board of Ed. v. Swann*, 402 U.S. 43, 46 (1971); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); *United States v. Montgomery County Board of Educ.*, 395 U.S. 225 (1971); *see also, Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). "When past and continuing violations are found, some ratios are likely to be useful starting points in shaping a remedy." *North Carolina State Board of Education v. Swann, supra*, 402 U.S. at 46.

In the employment context, these principles sustain racial preferences in cases in which they are necessary to an effective remedy for unconstitutional discrimination.

1. In several cases, lower federal courts have concluded that racial preferences were required simply to end discriminatory selections and assure minorities equal access to employment opportunities. *Paxton v. Union National Bank*, 688 F.2d 552, 574 (8th Cir. 1982); *Chisholm v. U.S. Postal Service*, 665 F.2d 482, 499 (4th Cir. 1981); *Association Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 269-70 (2d Cir. 1981); *Firefighters Institute v. City of St. Louis*, 588 F.2d 235, 240-41 (8th Cir. 1978). If there are no valid objective criteria on which to base hiring decisions and there is evidence of actual resistance to the employment of minorities, racial preferences surely would pass muster as part of a constitutional remedy "to insure against the risk of inadequate compliance," *Hutto v. Finney*, 437 U.S. 678, 687 (1978). This is particularly so when prior remedial orders without such preferences have failed to substantially increase the number of minority employees, *See, e.g., NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053, 1055-56 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); *United States v. Wood Lathers Local 46*, 471 F.2d 408, 411-12 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

2. Apart from preventing discriminatory selections, it may be necessary to promptly introduce a significant number of minorities into the workforce to eliminate "the pre-existing discriminatory environment," *NAACP v. Allen, supra*, 493 F.2d at 619, and to offer minorities a non-discriminatory employment opportunity.

Several courts have noted the importance of racial preferences in overcoming the employer's reputation for excluding minorities, and securing a flow of minority applicants that is not restricted as a result of the prior dis-

crimination. For example, in *Morrow v. Crisler*, *supra*, the court of appeals found that the defendant's compliance with the district court's general prohibition against continued racial discrimination in the employment of members of the Mississippi Highway Patrol had not eliminated the effects of the discrimination. In the two-year period between the issuance of the district court's injunction and the hearing before the court of appeals, the defendant had hired every qualified minority who applied. Yet of the 91 new officers who were hired, only six were black, although the relevant labor market was more than one-third black. In remanding and instructing the district court to impose some form of racial preference in hiring, the court of appeals indicated that only such an order would put an end to the continuing effects of the past discrimination:

> The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices. To counteract this reputation, the District Court ordered the Patrol to conduct an affirmative recruitment program. The efficacy of this program is belied by appellees' assertion that qualified blacks are not in fact applying for positions . . . . [W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . . .

491 F.2d at 1056. *Accord*, *United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1344 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1340 (2d Cir. 1973).

Even if minorities know that the employer no longer will reject them for discriminatory reasons, they still may be unwilling to enter a work situation from which

minorities traditionally have been excluded. *See, Ford Motor Co. v. E.E.O.C.*, 102 S.Ct. 3057, 3061 (1982). Resentment or prejudice against the newcomers can lead to social ostracism or even harassment. *See, e.g., Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 924-45 (D.N.J. 1978). Only a remedy that provides for the early entry of a significant number of minorities into the workforce can overcome this unwillingness, and assure to those minorities who are employed a work environment that is free from racial discrimination, tension and harassment. *See, Taylor v. Jones*, 653 F.2d 1193, 1203-04 (8th Cir. 1981).[1]

The school desegregation cases provide an apt analogy. In the years immediately after *Brown v. Board of Education*, 347 U.S. 483 (1954), it was assumed that the constitutional rights of black children could be protected simply by permitting them to transfer to all-white schools. *See, e.g., Lockett v. Board of Educ. of Muscogee Co. School District*, 342 F.2d 225 (5th Cir. 1965); *Stell v. Savannah-Chatham Co. Board of Educ.*, 333 F.2d 55 (5th Cir. 1964). It soon became apparent, however, that despite the desire of many black families to secure for their children the benefits of an integrated education, they were unwilling to have them bear the brunt of the desegregation effort. Experience indicated that under so-called "freedom of choice" plans, only a handful of black

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[1] The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. . . . Quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution.

***NAACP v. Allen, supra*, 493 F.2d at 621.**

children chose to enroll in previously all white schools. *See, e.g., United States v. Hinds Co. School Board*, 417 F.2d 852, 855-56 (5th Cir. 1969); *Hall v. St. Helena Parish School Board*, 417 F.2d 801, 808, 813 (5th Cir. 1969).

In the landmark case of *Green v. County School Board*, 391 U.S. 430 (1968), this Court held that black children must be afforded the opportunity not merely to attend an all white school, but to attend a non-racial school that is not infected by past discrimination. Reassignment, redistricting, zoning and other similar "quota-type" relief were mandated in order to achieve this. In subsequent decisions, this Court required school boards to reassign or employ minority teachers, because an integrated faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Bd. of Ed., supra*, 395 U.S. at 232. *See also, Rogers v. Paul*, 382 U.S. 198 (1965); *Bradley v. School Bd. of City of Richmond*, 382 U.S. 103 (1965).

As previously indicated, similar factors operate in employment discrimination cases. Although the immediate elimination of the continuing effects of past discrimination may be no more possible in employment than it is in education, racial preferences can expedite a process that otherwise might take years to complete. *Cf. Columbus Board of Educ. v. Penick*, 443 U.S. 449 (1979); *Swann v. Charlotte-Mecklenburg Board of Educ., supra*; *Green v. County School Board, supra.*

3. In the employment context, eliminating the effects of past discrimination means more than providing individual minority group members with non-discriminatory employment opportunities, although that certainly is an important element. There is a broader interest in eliminating the "condition that offends the constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *accord, Rogers v. Herman Lodge*, 102 S.Ct. 3272, 3281 (1982). In appropriate circumstances, this interest may provide

an independent justification for a remedy that includes racial preferences.

A necessary effect of unconstitutional discrimination against minorities is their relative absence from the particular workforce. Racial preferences that are intended to achieve the ethnic diversity that would have existed but for the unlawful discrimination serve the societal interest in eliminating this effect. *See, NAACP v. Allen, supra,* 493 F.2d at 619. The importance of this societal interest may depend in any particular case on the nature, extent and duration of the unlawful discrimination, and the type of employment involved;[2] and it must be considered in conjunction with other relevant interests, including the rights and expectations of individuals outside the protected group.[3] Moreover, any racial preference is subject to the requirement that the person hired must fully meet the legitimate requirements of the job. *See, e.g., Taylor v. Jones,* 653 F.2d 1193, 1204 (8th Cir. 1981); *United States v. City of Miami,* 614 F.2d 1322, 1340 (5th Cir. 1980); *Crocket v. Green,* 534 F.2d 715, 719 (7th Cir. 1976). There undoubtedly are other factors to be considered in determining when the societal interest in achieving the racial composition of the workforce that would have existed in the absence of unlawful discrimination justifies the use of racial preferences. It is not our pur-

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[2] Undoubtedly, the interest in the elimination of the effects of discrimination in the hiring of police and fire personnel is greater than in other less visible and less vital areas of public employment. *Boston Chapter, NAACP v. Beecher, supra,* 679 F.2d at 977; *Detroit Police Officers' Ass'n. v. Young,* 608 F.2d 671, 695-96 (6th Cir. 1979); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, supra,* 482 F.2d at 1341.

[3] In *Carter v. Gallagher,* 452 F.2d 327 (8th Cir. 1972), *(en banc)*, for example, the court approved the use of a racial preference in hiring, but provided that it not entirely exclude non-minorities even for a short period. In *Bridgeport Guardians, supra,* 482 F.2d at 1341, the court disapproved the use of racial preferences in promotions, where the only violation was in hiring and where expectations of majority employees to promotions were otherwise well established.

pose to suggest what the proper balance might be in any particular case; but rather to suggest that this societal interest in eliminating the effects of unlawful discrimination is legitimate and is entitled to be weighed by the district court in fashioning an appropriate remedy.

B. The Rationale for Using Racial Preferences in Hiring Remedies Also Justifies Their Use in Connection with Layoffs.

Although racial preferences in employment cases generally have involved hiring, as opposed to layoffs, there is no principled reason why the need to eliminate the effects of unlawful discrimination would not, in appropriate circumstances, justify preferences in the latter regard as well. Indeed, hiring and layoffs are opposite sides of the same coin and preferential treatment may be necessary "to ensure that [hiring] relief already ordered not be eviscerated by seniority-based layoffs." *Boston Chapter NAACP v. Beecher, supra,* 679 F.2d at 974-975. *See, Morgan v. O'Bryant,* 671 F.2d 23 (1st Cir.), *cert. denied,* 103 S.Ct. 62 (1982); *Brown v. Neeb,* 644 F.2d 551 (6th Cir. 1981).

This is not to deny that there is an "instinctive" difference between hiring and layoff. When layoffs are involved, the "innocent" non-minorities can be more precisely identified and the adverse impact on them more readily gauged. But this difference does not relate to the scope of the district court's equitable power to provide a remedy for unconstitutional employment discrimination; it is rather a factor to be taken into account by the district court in considering the appropriateness of various alternative remedies "for the particular circumstances." *Swann v. Charlotte-Mecklenburg Board of Educ., supra,* 402 U.S. at 25.[4]

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[4] The equal protection argument asserted on behalf of the non-minority employees who were laid-off is simply the converse of the argument that the remedy is not lawful. Assuming that the orders of the district court are appropriate remedies for the racial discrimination found to exist, the resulting racial classifications pass

C. The Validity of the Underlying Findings of Constitutional Violations Remains Unimpaired for Purposes of this Proceeding.

It is the position of petitioners and several of their supporting *amici* that this Court can dispose of these cases without deciding whether racial preferences may be imposed by a district court to remedy unconstitutional discrimination. Specifically, they argue that the orders issued by the district court in 1981 cannot be sustained under constitutional standards because the legal basis for the original findings of constitutional violations has been undercut by this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976). This argument fails, however, because petitioners have not challenged the underlying judgments of liability pursuant to the procedure provided in Rule 60(b) of the Federal Rules of Civil Procedure, and accordingly, the findings of constitutional violations remain operative and unimpaired for purposes of this proceeding.

In *Pasadena City Board of Ed. v. Spangler*, 427 U.S. 424 (1976), the district court in 1974 refused to dissolve a 1970 desegregation order. This Court was asked to overturn the district court's decision on the ground, *inter alia*, that the underlying finding of unconstitutional segregation had been undercut by subsequent decisions of this Court. *See*, Brief for Petitioners, No. 75-164 (O.T. 1975), pp. 3, 12-13. Petitioners had not filed a motion in the district court to reconsider the judgment of liability, and this Court declined to consider the validity of that judgment, noting that "[a]ll that is now before us are the questions of whether the District Court was correct [in denying the motion to modify.]." 427 U.S. at 432. *Accord, id.* at 443-44 (Marshall, J., dissenting).

Here, the district court's findings that the employment practices of the Police and Fire Departments were in

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constitutional muster. *See, University of California v. Bakke, supra*, 438 U.S. at 301-02 (Powell, J.), 366-68 (Brennan, White, Marshall & Blackmun, JJ.).

violation of the Fourteenth Amendment and Section 1981 similarly became final when they were affirmed by the court of appeals in 1972 (police officers case) and 1974 (firefighters case), and no further review was sought. Notwithstanding subsequent changes in decisional law, these original judgments as to liability remain in effect "until . . . modified or reversed," *Pasadena City Board of Ed. v. Spangler, supra*, 427 U.S. at 439-40, "by orderly review." *Howat v. Kansas*, 258 U.S. 181, 190 (1922). And, as *Spangler* makes clear, having made no effort to set aside the district court's liability judgments, petitioners may not in this proceeding challenge the remedy on the ground that those judgments no longer are valid.

This is not simply a technicality without impact on the rights of the parties. To the contrary, if petitioners were allowed to bypass the procedure set forth in FRCP 60(b), and challenge the remedy based on intervening decisions of this Court affecting the predicate for the liability, the rights of respondents would be significantly impaired. Prior to 1976, unintentional discrimination was regarded as sufficient to establish a claim under the 14th Amendment. It was in this context that these cases were litigated and, accordingly, respondents made no effort to prove intentional discrimination.[8] If a proper attempt had been made to set aside the judgments of liability following the decision in *Washington v. Davis*, respondents would have had an opportunity to prove the existence of constitutional violations under the standard set

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[8] Judge Wyzanski pointed this out in his opinion in the police case. *See, Castro v. Beecher*, 334 F. Supp. 930, 935 n.4 (D. Mass. 1971).

In view of the state of the law, references in the original opinions of the court of appeals to "unintentional discrimination" mean only that there was no effort to prove intentional discrimination. *See, Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974); *Castro v. Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

forth in that case. And, as the court of appeals observed, "[i]t is by no means clear that [the] decisions . . . should have been different under the new standards." 679 F.2d at 971.

It likewise is speculative whether petitioners even would have been allowed to challenge the district court's underlying liability judgments had they attempted to do so when the layoff question was before the district court in 1981. A motion to set aside a judgment pursuant to FRCP 60(b)(5) or (6) must be made "within a reasonable time," as determined on the basis of all relevant circumstances. *See, e.g., Smith v. Missouri Pacific R.R. Co.*, 615 F.2d 683, 684-85 (5th Cir. 1980). *Washington v. Davis* was decided in 1976, and the district court well might have concluded that a motion made some five years later was not "within a reasonable time," particularly since most of the relevant events would by that time have taken place some ten years earlier.

Petitioners and certain of their supporting *amici* attempt to circumvent the finality of the original liability judgments by focusing solely on the district court's 1981 order. State petitioners, for example, concede that *Washington v. Davis* did not destroy "the constitutional predicate for the relief originally granted by the district court," Brief at 54, but contend that the court's 1981 order is affected because it "extended" the original relief ordered in the cases. *Id.*[8]

The thrust of this argument is that, as a precondition to any modification of the outstanding injunctive orders to account for new circumstances, respondents were required to reestablish petitioners' liability *ab initio*. This Court has held, however, that a plaintiff is entitled to

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[8] *See also*, Brief *Amici Curiae* for American Federation of Labor-Congress of Industrial Organizations and the Public Employee Department, AFL-CIO, at 3-4.

modify an outstanding injunction simply by showing, as was done here, that the modification is necessary to effectuate its original purpose. *See, United States v. United Shoe Corp.*, 391 U.S. 244 (1968); *Chrysler Corporation v. United States*, 316 U.S. 556, 562 (1942); *accord, King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) Inasmuch as any other rule would provide for needless relitigation of underlying liability issues, the burden plainly and properly is on the defendant to raise any question that may exist as to the liability findings, and to do so in a manner that allows for response and detailed consideration.

In sum, having failed to take the proper steps to set aside the district court's original findings that the Boston Police and Fire Departments engaged in unconstitutional discrimination, petitioners may not now, on the basis of intervening decisions of this Court, challenge the orders designed to remedy the effects of that discrimination. Only the remedy question is now before this Court. For the reasons set forth in this Part of our brief, a district court has discretion to impose a remedy for unconstitutional employment discrimination that includes racial preferences.

II. RACIAL PREFERENCES THAT ALTER BONA FIDE SENIORITY RIGHTS AND BENEFIT NON-VICTIMS MAY BE INCLUDED IN REMEDIAL ORDERS UNDER TITLE VII.[7]

Congress' principal purpose in the enactment of Title VII was not simply to provide a remedy to persons who

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[7] In this section of the brief we respond to the contention of petitioners and supporting *amici curiae* that Title VII does not permit a district court to issue an order that alters *bona fide* seniority rights or accords a racial preference to non-victims of the statutory violation. It is important to emphasize, however, that this question is not essential to the disposition of these cases if this

individually had been denied employment opportunities. As this Court explained in *United Steelworkers v. Weber*, 443 U.S. 193 (1979):

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semiskilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379-7380 (remarks of Sen. Kennedy) . . . . "[T]he relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:
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> > "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.
>
> Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream

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Court concludes that the challenged orders constitute an appropriate remedy for the constitutional violations found to exist. In this event, Title VII could affect the outcome *only* if it somehow affects the authority of a district court to use racial preferences to remedy violations of the 14th Amendment. This clearly is not the case: the limitations that Title VII places on the remedial power of a district court refer only to remedies that may be imposed for violations of Title VII itself, and we do not understand any of the petitioners or *amici curiae* to contend otherwise.

> of American society—could not be achieved unless this trend were reversed.
>
> . . . [I]t was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

443 U.S. at 202-03.[8]

As the discussion in Part I of this brief indicates, racial preferences can play a vital role in achieving the exact purposes that this Court has identified as underlying Title VII. This Court, moreover, has described the remedial authority of the district courts in Title VII cases in the same broad terms applicable to remedies for constitutional violations. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976). It follows, therefore, that racial preferences appropriate to remedy unconstitutional employment discrimination may also be used to remedy a statutory violation *unless* there is something in Title VII that dictates a contrary result. Petitioners and their supporting *amici* argue that Sections 703(h) and 706(g) do so dictate. As we demonstrate below, the language and legislative history of these provisions point in precisely the opposite direction.

A. Section 703(h) of Title VII Does Not Bar Remedies that Alter Seniority Rights.

Section 703(h) of Title VII, as amended, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

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[8] The "secondary purpose" of Title VII is to make whole victims of unlawful discrimination. *Ford Motor Co. v. EEOC*, *supra*, 102 S.Ct. at 3065.

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

Petitioners and several supporting *amici* argue that this provision bars any district court order which requires that layoffs be made other than on the basis of strict seniority as provided in Mass. Gen. Laws c. 31, § 39.

This argument is foreclosed by this Court's decision in *Franks v. Bowman Transportation Co., supra.* In *Franks*, this Court explicitly held that § 703(h) does not act as a limitation on a district court's power to remedy a violation of Title VII:

> On its face, § 703(h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g) . . ., in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g).

424 U.S. at 758-59 (footnote omitted). *Accord, id.* at 781-82 (Powell, J., concurring in part and dissenting in part.) Nothing in the statute itself or the opinion of the Court suggests that the definitional character of § 703(h) changes because a remedial order benefits non-victims of discrimination rather than identified victims. It is as inapplicable in one case as in the other.[9]

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[9] Although Section 703(h) does not apply in this case, this is not to say that the policy it expresses—protection of seniority rights—is of no significance. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 781-82 (1976) (Powell, J., concurring in part, dissenting in

B. Section 706(g) of Title VII Authorizes Racial Preferences that Benefit Non-Victims.

The provision of Title VII that governs the remedial power of the district courts is Section 706(g), as amended, 42 U.S.C. § 2000e-5(g). The language and legislative history of this provision support the authority of a district court to impose racial preferences in appropriate cases.

1. The text of Section 706(g) as enacted by Congress in 1964, and prior to its amendment in 1972, was, in pertinent part, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ., the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Although the section broadly authorizes "such affirmative action as may be appropriate," and thus seems explicitly to support preferential remedies in appropriate cases, *amici* AFL-CIO and PED argue that the last sentence of the section (which was not changed in 1972) precludes

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part). This policy must, however, be weighed against countervailing policies favoring the elimination of the effects of the unlawful discrimination.

the entry of relief that will benefit non-victims. To the contrary, this provision is limited to defining the rights of persons in court, complaining of prior adverse action by the employer and seeking compensatory or "make whole" relief.

The provision in question was modeled after a similar provision in Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c):[10]

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Congress in 1935 did not adopt this language to bar quota remedies for union members. Rather, Section 10(c), like Section 706(g), provides that only claimants found to have suffered adverse action on account of a prohibited form of discrimination are entitled to relief. *See, EEOC v. AT&T*, 556 F.2d, 167, 175-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). By contrast, beneficiaries of preferential hiring remedies are not claimants, are not typically persons who previously were denied employment, are not identified in the order and have no personal entitlement by virtue of the order. Rather, they are newcomers to the situation, selected by the employer, who happen to be members of the protected group. The purpose of the order is not to make whole these individuals, but to eliminate the discrimination and its effects. In a word, the two situations are distinct. The last sentence of Section 706(g) speaks to one, but not the other.[11]

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[10] This Court has noted that Section 706(g) is modeled on Section 10(c) of the National Labor Relations Act. *Albemarle Paper Co. v. Moody*, 422 U.S. at 419; *Franks v. Bowman Transp. Co.*, 424 U.S. at 769, 774-75 and n. 34.

[11] Similarly, the standards for individual relief articulated by this Court in *International Brotherhood of Teamsters v. United*

Congress in 1964 did address the question of racial preferences in Section 703(j), 42 U.S.C. § 2000e-2(j), which provides:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community.

This language supports the view that Congress did not intend to prohibit the imposition of racial preferences in all circumstances. If Congress had meant that no employer could be required to accord racial preferences for any reason, including as a remedy for unlawful discrimination, it would have so stated in Section 703(j). Instead, it limited the prohibition to situations in which such preferences would be founded solely on racial imbalance. Compare, *United Steelworkers v. Weber*, 443 U.S. at 204-07.[12]

States, 431 U.S. 324, 357-76 (1977), relate to the disposition of claims of individual entitlement. The Court did not, in *Teamsters*, address the distinct question of the propriety of racial preferences to overcome the effects of past discrimination.

[12] There are statements in the legislative history of the 1964 Act that indicate an intention to bar preferential hiring requirements even as a remedy for a proven violation. *E.g.*, 110 Cong. Rec. 1518 (Rep. Celler); 110 Cong. Rec. 6563 (Sen. Kuchel). But many other statements generally exhorting against "quotas" did not have that specific frame of reference. *E.g.*, 110 Cong. Rec. 7207 (Sen. Clark); 110 Cong. Rec. 7418-20 (Sen. Humphrey). Particularly in view of the failure of Congress expressly to prohibit racial preferences, an "interpretation [prohibiting such preferences] gives undue weight to a few isolated passages from among the thousands of pages of legislative history . . ." *University of California v. Bakke*, 438 U.S. 265, 342, n. 17 (1978) (Opinion of Justice Brennan,

2. Between 1965, when Title VII became effective, and 1972 when it was amended by Congress, numerous federal courts, including at least four courts of appeals, held that district courts have authority to use racial preferences in hiring as a remedy for proven discrimination. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. IBEW, Local 38*, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123, 132-33 (8th Cir. 1969); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Central Motor Lines, Inc.*, 325 F. Supp 478 (W.D.N.C. 1970); *United States v. Local No. 8, Intern. Ass'n of Bridge, S., O & R.I.*, 315 F. Supp. 1202 (W.D.Wash. 1970). We have found no case in which any court held that such a remedy was prohibited by the Act.

In the same period, the Secretary of Labor, in the implementation of Executive Order 11246, sought to impose on government contractors affirmative action plans, such as the Philadelphia Plan, which encouraged preferential hiring of minorities solely on the basis of their relative absence from the employer's workforce. In a series of cases, employers argued that these plans were violative of Title VII, and particularly Section 703(j), but the courts of appeals uniformly rejected these challenges, finding that Section 703(j) was a limitation only on what could and could not be required under Title VII. *Contractors Association v. Schultz*, 442 F.2d

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Justice White, Justice Marshall and Justice Blackmun). *See also id.* at 285 (Powell, J.).

In a number of cases, this Court has rejected restrictive comments in the 1964 legislative debates unsupported by statutory language, in favor of constructions considered more in keeping with the overall policy and purpose of the Act. *United Steelworkers v. Weber*, 443 U.S. 193, 205-08, n. 7 (1979); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971); *County of Washington v. Gunther*, 452 U.S. 161, 101 S. Ct. 2242, 2249-51 (1981). *See Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring).

159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972).

In 1972, Congress enacted the Equal Employment Opportunity Act, 86 Stat. 103, amending the 1964 Act in a number of respects. There is specific evidence that, in the course of its consideration of the 1972 legislation, the judicial decisions imposing preferential hiring remedies were brought to the attention of Congress. Both the House and Senate Reports cite such decisions. H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, n.2, 13, n.4 (1971), *reprinted in* United States Senate Committee on Labor & Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 at 68, n.2, 73, n.4 (Nov. 1972) (hereafter "1972 Legis. Hist."); S. Rep. No. 415, 92d Cong., 1st Sess. 5, n.1, 21 (1971), *reprinted in* 1972 Legis. Hist. at 414, n.1, 430. The issue of preferential hiring remedies was discussed on the floor of both the House of Representatives, see p. 27, n.14, *infra*, and the Senate, see pp. 25-27, *infra*. In the course of the debate, the decisions of the courts of appeals in *United States v. Ironworkers*, *supra*, and *Contractors Association v. Schultz*, *supra*, were printed in the Congressional Record. 1972 Legis. Hist. at 1048-70. See p. 26, *infra*.

The Conference Report on the bill that was enacted into law, stated:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Section by Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conference Report, 118 Cong. Rec. 7166 (1972). This Court has noted that this language "could hardly be more ex-

plicit," *Franks v. Bowman Transp. Co., supra*, 424 U.S. at 764, n.21, and has relied on it as evidencing Congressional approval of existing constructions of the 1964 Act. See *ibid.*; *id.* at 796, n.18 (Powell, J.); *University of California v. Bakke*, 438 U.S. 265, 354, n.28 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun). In view of Congress' specific consideration of the preferential hiring cases, "we have in this instance unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of § 706(g) remedial power conferred by the 1964 Act." *United States v. International Union of Elevator Const.*, 538 F.2d 1012, 1019-20 (3d Cir. 1976).

3. There is additional support for the conclusion that Congress adopted the foregoing interpretation in 1972. As part of the 1972 amendments, the following italicized language was added to Section 706(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back-pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

It is manifest from the face of this amendment that it was intended to strengthen and broaden the remedial authority of the district courts. The origin of the amendment buttresses this conclusion.

When amendments to Title VII were offered in the Senate in 1971, the bill reported by the Committee on Labor and Public Welfare provided for enforcement proceedings before the Equal Employment Opportunity Commission, with the EEOC authorized to issue cease and desist orders enforceable by the federal courts. S.

Rep. No. 415, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 Legis. Hist. 410-97. In a statement of individual views contained in the Committee Report, Senator Dominick took the position, subsequently accepted by the Senate and enacted into law, that the cause of Title VII enforcement would be better served by authorizing the EEOC to file enforcement actions in federal district courts. 1972 Legis. Hist. at 493-96. Essentially, Senator Dominick argued that the federal courts would provide speedier, fairer and more effective hearings and determinations as to violations of Title VII rights, partly because they had direct injunctive authority. *Id.* at 495.

The Committee Report, with Senator Dominick's separate views, was filed on October 28, 1971. *Id.* at 410. Shortly thereafter, on November 8, 1971, Senator Dominick introduced an amendment to the Committee bill that provided for court enforcement of Title VII in actions brought by the EEOC. *Id.* at 553. This amendment included the changes in Section 706(g) noted above and later enacted into law. Since the debate between the supporters of the Committee bill and the supporters of the Dominick amendment focused on the question of the relative efficacy of EEOC versus court enforcement action, *id.* at 1481-1483; 1521-1557, it is reasonable to conclude that the changes in Section 706(g) proposed by Senator Dominick were designed to bolster his argument that the Act could be more effectively enforced through court proceedings. In the course of the debate on his amendment, Senator Dominick referred to the cases under the 1964 Act in which "minority hiring requirements at the expense, in many instances, of union hiring and seniority rights" were imposed, *id.* at 694, and argued that this power should be in the federal courts, not in the EEOC. *Id.*[13]

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[13] The only direct references to the Section 706(g) amendments appear in the Section by Section Analyses submitted by Senator

4. Further evidence of a Congressional intention in 1972 to approve the use of remedies under Title VII that went beyond the identified victims of unlawful discrimination is found in the rejection of an amendment introduced by Senator Ervin, which would have prohibited any "department, agency or officer of the United States" from requiring the employment of "persons of a particular race, . . . in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." 1972 Legis. Hist. 1017. In support of his amendment, Senator Ervin explained that he intended to forbid the imposition of minority hiring requirements, by any name, in proceedings under Title VII or Executive Order 11246. *Id.* at 1042-45. Senator Williams, the Committee Chairman, yielded to Senator Javits, ranking minority member and a manager of the bill, to respond to the Ervin amendment. *Id.* at 1046-72.

Senator Javits' response, including reprinted material, consumes thirteen pages of the Congressional Record. 118 Cong. Rec. 1664-76. Noting that "the depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit in given respects the officers of the United States but also the courts of the United States . . .," Senator Javits stated:

> [W]hat is sought to be reached is . . . the whole concept of "affirmative action" as it has been developed

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Williams in the Senate prior to passage, and by the Conference Committee. 1972 Legis. Hist. 1773, 1848. The comment with respect to Section 706(g) in the Senate analysis states in part:

> The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible.

Id., at 1773-74. Against the backdrop of Congress' awareness of the "minority hiring requirements" imposed under the 1964 Act, this statement can only be interpreted to reaffirm that authority.

> under Executive Order 11246 and as a remedial concept under Title VII.
>
> • • •
>
> [T]he amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices.

1972 Legis. Hist. 1046, 1048. In support of his remarks, Senator Javits specifically described several court decisions under Title VII in which racial preferences were imposed, and had printed in the Congressional Record the text of the decision of the Third Circuit in *Contractors Association v. Schultz*, and the decision of the Ninth Circuit in *United States v. Ironworkers, Local 86*, as well as a description of settlements in two cases brought by the Department of Justice which established racial preferences. 1972 Legis. Hist. 1048-70, 1072.

Senator Javits concluded his remarks against the Ervin amendment by noting:

> [T]his amendment . . . would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired, and that could apply to government as well as private employers.

Id. at 1071.

Following Senator Javits detailed opposition to the amendment, Senator Williams added a few words of his own. Referring to the "examples of situations cited by the Senator from New York of the kind of situation that could be affected adversely," Senator Williams stated the "amendment raises the real threat of destroying any potential for effective law enforcement." He added:

> I am afraid—I am desperately afraid—that this amendment would strip Title VII of the Civil Rights Act of 1964 of all of its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.

Id. at 1072. As the amendment related only to racial preferences, Senator Williams' statement expresses the view that, unless the courts had the power to impose such preferences, violations of the Act could not be effectively remedied. Following the Javits and Williams statements, the Ervin amendment was rejected by a vote of 44-22. *Id.* at 1074.[14]

C. The Use of Racial Preferences to Remedy Title VII Violations Has Been Approved By a Majority of the Members of this Court and by the Lower Federal Courts.

A majority of the Justices of this Court—indeed, all who have spoken to the question—have indicated that remedial orders under Title VII are not limited to identified victims of proven discrimination. In their joint opinion in *Regents of the University of California v. Bakke*, Justices Brennan, White, Marshall and Blackmun stated:

> Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII

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[14] There was no discussion on the floor of the House of Representatives of preferential remedies under Title VII. On the other hand, the use of such remedies under Executive Order 11246 was debated in the House and no action was taken. *E.g.* 1972 Legis. Hist. 222, 255-56, 260-61. Particularly, as a provision was added to Title VII dealing with another aspect of Executive Order enforcement, 42 U.S.C. § 2000e-17, it can be concluded that the failure of the House to prohibit racial preferences under the Executive Order (which are imposed without any finding of discrimination) supports the inference that such remedies for proven violations of Title VII were not disapproved.

> (Equal Employment Opportunities Act of 1972, 86 Stat. 103) a number of Courts of Appeals approved race-conscious action to remedy the effects of employment discrimination.
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> • • • •
>
> Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 732, 747-757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII.
>
> • • • •
>
> Such [Title VII] relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.

438 U.S. at 353, n.28, 363, 366. See also *id.*, 438 U.S. at 301-02 (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring).

This is also the unanimous view of the lower Federal courts.[18]

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[18] In addition to the pre-1972 cases cited at p. 21, *supra*, see *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1611 (1982); *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2233 (1982); *United States v. City of Buffalo*, 633 F.2d 643 (2d Cir. 1980); *Guardians Ass'n of New York City v. Civil Service Comm'n*

The conclusion that racial preferences going beyond proven victims of discrimination may be imposed to remedy a violation of Title VII draws further support from this Court's decision in *United Steelworkers v. Weber, supra.* In *Weber*, this Court held that Title VII presented no obstacle to the voluntary implementation by the employer and the union of a racial preference that was not directed toward victims of discrimination, even without an adjudication that there had been any unlawful discrimination:

> [T]he legislative history of Title VII and the historical context from which the Act arose . . . makes clear that an interpretation . . . that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.

United Steelworkers v. Weber, supra, 443 U.S. at 201-02. If racial preferences can be used voluntarily, in the absence of any finding of unlawful discrimination and in the absence of any supervision by a court or other competent authority, surely the same remedy may be imposed by a federal court in order to eliminate the effects of a proven statutory violation.

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of the City of New York, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979); *EEOC v. Local 638*, 565 F.2d 31 (2d Cir. 1977); *EEOC v. AT&T*, 556 F.2d 167, 174-177 (3d Cir. 1977); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *United States v. Int'l Union of Elevator Const.*, 538 F.2d 1012, 1019 (3d Cir. 1976); *Rios v. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Wood Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Commonwealth of Pennsylvania v. Local Union 542, Intern. Union of Operating Engineers*, 488 F. Supp. 988 (E.D. Pa. 1980); *United States v. State of New York*, 475 F. Supp. 1103 (N.D. N.Y. 1979).

For all of the above reasons, Title VII should not be construed by this Court to prohibit remedies that include racial preferences benefitting non-victims of the unlawful discrimination.

CONCLUSION

There is nothing in the Fourteenth Amendment or Title VII that prohibits a district court from issuing a remedial order that includes racial preferences, even if such preferences are inconsistent with a *bona fide* seniority-based layoff system and the minorities who benefit from them are not victims of the constitutional or statutory violations that are the predicate for the order. The question of whether any particular order represents an appropriate exercise of a district court's power to remedy the continuing effects of past employment discrimination must be determined on a case-by-case basis after examining all of the relevant factors.

For the reasons set forth by respondents and the courts below, we believe that the orders challenged in these cases do in fact represent an appropriate exercise of the district court's remedial power, and the judgment of the court of appeals, therefore, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner,*

—v.—

BOSTON CHAPTER, NAACP, INC., ET AL., *Respondents.*

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., *Petitioner,*

—v.—

PEDRO CASTRO, ET AL., *Respondents.*

NANCY B. BEECHER, ET AL., *Petitioners,*

—v.—

BOSTON CHAPTER, NAACP, INC., ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ORGANIZATION FOR WOMEN; EQUAL RIGHTS ADVOCATES, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; NATIONAL WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S DIVISION, NATIONAL BAR ASSOCIATION; WOMEN'S EQUITY ACTION LEAGUE; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST OF AMICI CURIAE

This brief amicus curiae in support of respondents is submitted on behalf of the National Organization for Women; Equal Rights Advocates, Inc.; League of Women Voters of the United States; National Women's Law Center; Women Employed; Women's Division of the National Bar Association; Women's Equity Action League; and Women's Legal Defense Fund.*/ These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment.**/ Amici believe that the cases before the Court are of great importance to the ability of the federal courts to provide effective remedies for employment discrimination.

*/Letters from counsel for all parties, consenting to the filing of this brief, are being filed with the Clerk.

**/Statements describing each organization appear in the Appendix to this brief.

SUMMARY OF ARGUMENT

The petitioners in these cases ask the Court to subordinate judicially-supervised remedial orders to a seniority-based layoff plan which threatened to wipe out the progress made, pursuant to court order in the 1970's, toward racial integration of Boston's Police and Fire Departments. However, these cases are moot, because today all the laid off personnel are back at their jobs, thereby resolving the problem brought to the lower courts--the manner in which to implement the layoffs. None of the collateral claims asserted by petitioners suffices to transform these cases into a live controversy.

Permitting the operation of a seniority-based layoff plan to override remedies for discrimination interferes substantially with the ability of women of all races and ethnic groups to achieve economic self-

sufficiency. One of the most significant current demographic trends is the dramatic increase in the poverty of women and their children. Institutionalized sex discrimination contributes to this trend and confines women to low-status, low paying jobs.

Systematic exclusion of women from employment in the protective services has been judicially acknowledged, and courts have acted to remedy the effects of this discrimination. The ability of the federal courts to protect the effectiveness of their remedial decrees, at issue in the instant cases, directly affects the ability of all women to obtain and maintain employment in state and local governments.

The national policy to eliminate discrimination is clear, both under the Constitution and through Congressional legislation. However, despite enactment of various statutes prohibiting employment

discrimination, minorities and women are still struggling to achieve equality. In addition to hiring barriers, the "last hired, first fired" practice for structuring layoffs disproportionately affects women and minorities in a way that can eviscerate the modest progress made to date in integrating the work force.

This Court has recognized the strong remedial powers of the courts in effectuating anti-discrimination guarantees. The lower courts herein properly acted to preserve the effectiveness of their remedial decrees by temporarily suspending operation of a seniority-based layoff plan. The race-conscious nature of the remedy below is necessary and appropriate to achieve the goal of eliminating discrimination.

ARGUMENT

POINT I

THESE CASES ARE MOOT

These cases come to this Court on petitions to review orders of the district court mandating certain procedures to govern the layoffs of police and fire department personnel in the city of Boston during the summer of 1981. At the time the order was entered, the city was in the midst of a program to lay off over 13% of its police officers and over 12% of its firefighters. Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 970 (1st Cir. 1982) (hereinafter, Boston NAACP).[1/] Today, however, all the

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[1/] Had the layoffs been carried out as originally proposed, they would have resulted in the layoff of 54.5% of the Black and Hispanic police officers, and 45.6% of the Black and Hispanic firefighters. Boston NAACP, 679 F.2d at 970. The number of firefighters actually laid off was greater than projected--almost 15% of the force. Petition for Writ of Certiorari, Boston Firefighters Union, Local 718, at 7.

laid off personnel are back at their jobs, Brief of Petitioner, Boston Police Patrolmen's Assoc. at 6 n.1 (hereinafter, "Police Br."). Further, the Massachusetts legislature has mandated that no person laid off in the summer 1981 wave of layoffs can in the future be laid off due to lack of funds. 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.). The problem that caused the entry of the disputed order was how to carry out the layoffs the city had decided to put into effect. That problem has been resolved, and resolved in a way that will prevent its recurrence. These cases, therefore, are moot.

This Court has consistently held that the "rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed [citations omitted]." Steffel v. Thompson, 415 U.S. 452, 459

n.10 (1974). The fact that a case presented a live controversy at an earlier stage does not in itself assure that it will still be live at a later stage. See, e.g., Golden v. Zwickler, 394 U.S. 103 (1969). The fact that the requirement of a live controversy is rooted in Article III of the Constitution means, as the Court has often noted, that it is simply without power to adjudicate moot cases. See, e.g., North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (collecting cases); Richardson v. Ramirez, 418 U.S. 24, 36 (1974); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). In the instant cases, the controversy that existed in August, 1981 has since been resolved in forums other than the federal courts, leaving no issues for this Court.

The Court has recognized that there

are circumstances in which potentially mooting conditions do not operate to deprive the courts of jurisdiction under Art. III. This includes the circumstance in which the event complained of is "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973). The "voluntary cessation of allegedly illegal conduct... does not make [a] case moot." United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). Additionally, the presentation of a case as a class action under Rule 23, Fed.R.Civ.P., can allow the case to continue after the individual claims of the named plaintiffs have expired. Compare Sosna v. Iowa, 419 U.S. 393 (1975); with DeFunis v. Odegaard, 416 U.S. at 317.

The instant cases, however, fit in

none of these categories. The possibility that there will be other fiscally motivated layoffs of short, and therefore unreviewable, duration, has been effectively foreclosed by the Massachusetts legislature, 1982 Mass. Adv. Legis. Serv. ch. 190 (Law. Co-op.), which has also removed any aspect of "voluntariness" from the case. Since the parties before the court (or their members) constitute everyone who could possibly have a claim in this litigation,[2/] there can be no unnamed individuals with live claims despite the fact that the named parties' claims are moot.

[2/] Neither the Boston Police Commission nor the Boston Fire Commissioner, defendants in the litigation, appealed the district court's order to the First Circuit. Boston NAACP, 679 F.2d at 971.

Petitioners, as well as the United States as amicus curiae, nevertheless advance several hypotheses about why these cases are not moot. None of these suggestions can withstand analysis under this Court's precedents. On inspection, these suggestions fall into two categories: those that are speculative, see DeFunis v. Odegaard, 416 U.S. at 320 n.5, and those that in reality seek an advisory opinion from this Court. See Flast v. Cohen, 392 U.S. 83, 96 (1968).

The state petitioners speculate that "the provisions of Mass. St. 1980, c.580 ('Proposition 2 1/2')...may require an additional round of layoffs in many municipalities" other than Boston, and that the instant cases should therefore be decided on the merits. Petition for Writ of Certiorari at 23 n.9. The possibility of

future layoffs in some other city is hardly reason for this Court to adjudicate a dispute about past layoffs in Boston. This potential scenario lacks the "immediacy and reality" of a controversy, Golden v. Zwickler, 394 U.S. at 109, necessary to sustain Art. III jurisdiction.

The police union hypothesizes that "interruptions of [more senior, but laid off, white officers'] employment may defer their eligibility for promotional examinations." Police Br. at 6 n.1. It presents no facts to show that any officers have suffered--or are even likely to suffer--the alleged delay in promotional opportunity. Massachusetts law, however, provides that civil service personnel laid off for fiscal reasons do not lose any time of service for purposes of calculating their seniority. Mass. Ann.

Laws ch. 31, §33 (Law. Co-op. 1982 Supp.). Thus, it is difficult to see how the alleged harm could come about.[3/]

The cited statutory section does not merely preserve laid-off workers' seniority rights. It maintains the seniority of all employees, white and minority, in the same relation that existed before the entry of the district court's order. Thus, the parties today are in the identical positions, with respect to each other, that they held in June, 1981, before any layoffs took place. There is simply no current controversy between

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[3/] Moreover, the language of ch. 31 §33 that "continuity of service...shall be deemed not to have been interrupted..." if the employee was laid off for fiscal reasons, assures that the employee does not lose any time to be counted toward the statutory time-in-grade requirement for taking a promotional examination. Mass. Ann. Laws ch. 31, §59 (Law. Co-op. 1982 Supp.).

them.

An actual controversy between the parties to this litigation is not created by the suggestion of the United States that the loss of pay suffered by the laid off employees gives them a personal stake in the outcome of the case that is sufficient to render the case not moot. Brief of U.S. as amicus curiae at 9n. Although a party's personal stake[4/] in the outcome

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[4/] The need for a significant personal stake in the outcome has been developed most fully in the Court's decisions on standing. See, e.g., Baker v. Carr, 369 U.S. 186, 204 (1962); Flast v. Cohen, 392 U.S. at 99; Warth v. Seldin, 422 U.S. 490, 498-501 (1975). The requisites of standing are also relevant to the mootness inquiry, since mootness can be seen as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973), quoted in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980).

of the case is necessary for finding that a case is not moot, it is not sufficient. The reason for the personal stake requirement is "to assure that concrete adverseness...", Baker v. Carr, 369 U.S. 186, 204 necessary to the proper litigation of cases. While the allegation of loss of pay is superficially plausible, cf. Powell v. McCormack, 395 U.S. 486, 496 (1969), in the context of the instant cases it does not suffice to create a live controversy for decision by this Court.

The claim fails at the most basic level because there is no adverse interest represented in this case. In view of the statutory prohibition on future fiscally motivated layoffs, 1982 Mass. Adv. Legis. Serv., ch. 190, §25 (Law. Co-op.), respondents have no interest whatsoever in whether or not previously laid off white workers receive pay for their time of layoff, since

the resolution of that issue can have no effect on the employment status of Black and Hispanic members of the classes represented by respondents.[5/] As Justice Powell has pointed out, jurisdiction under Art. III requires that the party claiming injury make "a nonfrivolous showing of continuing or threatened injury at the hands of the adversary." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 412

[5/] This is an important distinction between the instant cases and many of this Court's prior decisions. In the Court's previous mootness inquiries, the parties have typically been a governmental agency on one side, and a private party claiming injury, on the other. The continuing interest of the government agency in the administration of its statutes or rules provided one side of the controversy; the claimed injury to the private party provided the other. See, e.g., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974) ("fixed and definite" policy of state government); Roe v. Wade, 410 U.S. 113 (1973) (state criminal statute); Sosna v. Iowa, 419 U.S. 393 (1975) (state residency requirement); Sibron v. New York, 392 U.S. 40 (1968) (state criminal statute). Here, by contrast, respondents have no ongoing interest in, much less responsibility for, the claimed injury asserted by some petitioners.

(1980) (Powell, J., dissenting) (emphasis added). Regardless of whether the claim of denial of pay provides the injury, these cases do not provide the adversary.

Indeed, a close look at the asserted back pay claim reveals that the adversaries are all to be found in the petitioners' camp. On one side are some of the members of the petitioner unions, and on the other is the Civil Service Commission, which is charged with the responsibility for hearing appeals of "person[s] aggrieved by a decision of an appointing authority." Mass. Ann. Laws ch. 31, §43 (Law. Co-op. 1982 Supp.). The back pay issue, if it exists, is a matter to be resolved in the first instance by the Massachusetts civil service review system, Mass. Ann. Laws ch. 31, §§39-44 (Law. Co-op. 1982 Supp.) (providing, inter alia, for judicial review of Civil Service Commission decisions), not

by this Court.[6/]

[6/] The contention of the United States that the district court's order has foreclosed the normal route of civil service appeals, Br. at 9n, is not persuasive. The order enjoined the state petitioners from "disapproving, invalidating or interfering with the termination" of any police or fire employees who challenged their layoffs. Castro v. Beecher, 522 F.Supp. 873, 878, 879 (D.Mass. 1981) (emphasis added). The order, appropriately, did not attempt to control any actions to be taken with respect to any possible ancillary questions about the layoffs, such as those now raised by petitioners, since the controversy before the district court only concerned the implementation of the layoffs themselves. The United States presents no facts to suggest that the district court's order has prevented or will prevent the Civil Service Commission from exercising its authority, in deciding an appeal, to "modify any penalty imposed by the appointing authority." Mass. Ann. Laws ch. 31, §43 (Law. Co-op. 1982 Supp.). Indeed, the Civil Service Commission whose authority has allegedly been compromised, has not raised this issue.

The related contention that the injunction issued below permanently enjoins the police and fire departments from laying off employees in a way that reduces minority representation below a specified level (U.S. Br. at 9n), and thus presents an ongoing controversy, is based on a misreading of the district court's decision. The requested modification of the consent de-

footnote continued

footnote continued

crees was found by the district court, and the finding was affirmed by the court of appeals, to be the result of the initial response of the municipal authorities to Proposition 2 1/2. Castro v. Beecher, 522 F.Supp. at 877; Boston NAACP, 679 F.2d at 972. The trial court's finding of fact clearly refers to the issue in the litigation as the "reductions in force now being conducted, and scheduled for completion on August 18, 1981," Castro v. Beecher, 522 F.Supp. at 876. The order was intended to address the "new and unforeseen conditions," id. at 877, presented by the lay-off program, and unmistakably does address that problem. To the extent that there is any possibility of interpreting the order as extending beyond the summer, 1981 situation, it is nevertheless rendered superfluous by the mandate imposed by the Massachusetts legislature. 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.).

In essence therefore, petitioners and amicus are asking this Court to render an advisory opinion on litigation that is not before it: monetary claims that some members of petitioner unions may be pursuing through the civil service procedures administered by the state petitioners. That may be a live controversy, but it is not the controversy in this litigation.[7/]

In sum, the controversy that brought these parties into court no longer exists. Nothing this Court decides about the merits of this case will "[touch] the legal re-

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[7/] The mere existence of a spirited dispute between the parties on the merits of the case does not in itself confer Art. III jurisdiction. See, e.g., Richardson v. Ramirez, 418 U.S. at 35-36; Hall v. Beals, 396 U.S. 45, 48-49 (1969) (per curiam); United States Parole Comm'n v. Geraghty, 445 U.S. at 421 n.16 (Powell, J., dissenting). Cf. Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam) (emotional involvement in case does not create live controversy).

lations of parties having adverse legal interests." North Carolina v. Rice, 404 U.S. at 246, quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). These cases should, therefore, be dismissed as moot.[8/]

In the event that the Court concludes that these cases are not moot, amici submit that the decision of the court of appeals should be affirmed, for the reasons set forth in Points II and III, infra.

[8/] In the alternative, amici respectfully suggest that the Court remand these cases for a determination of whether petitioners' allegations of continuing injury are well-founded, and whether the cases are moot. See, e.g., Steffel v. Thompson, 415 U.S. 452 (1974); Spomer v. Littleton, 414 U.S. 514 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973); Scott v. Kentucky Parole Board, 429 U.S. 60 (1976).

Point II

THESE CASES RAISE ISSUES HAVING A SIGNIFICANT IMPACT ON WOMEN'S OPPORTUNITIES TO BECOME ECONOMICALLY SELF-SUFFICIENT

The desperate economic position of women in our society--and growing poverty of women and children generally--is today widely acknowledged. See, e.g., Nat'l Advisory Council on Economic Opportunity. Critical Choices for the 80's (1980) [hereinafter cited as Critical Choices]; U.S. Comm'n on Civil Rights, Women Still in Poverty (1979). Nearly one-third of all female-headed households are living below the poverty line, while only one in 18 male-headed households finds itself in a similar position. Critical Choices at 17.[9/]

[9/] Between 1980 and 1981, the number of poor families headed by women increased by 231,000, Bureau of the Census, U.S. Dept. of Commerce, Money Income and Poverty Status of Families and Persons in the United States: 1981 (Advance Data from the March, 1982 Current Population Survey) 3, Table B. (1982).

In 1980, families maintained by women alone had the lowest median annual income of all families. Bureau of the Census, U.S. Dept. of Commerce, Characteristics of Households and Persons Receiving Selected Non-Cash Benefits: 1980 9 (1982) [hereinafter, Characteristics].

The situation is particularly grim for women with young children. In 1978, the median income of families headed by women whose children were under six was $4,498, 30% of the median income for all families with children under six, Bureau of the Census, U.S. Dept. of Commerce, Families Maintained by Female Householders 1970-79 36 (1980). The National Advisory Council on Economic Opportunity has estimated that if current demographic trends continue, this nation's impoverished class by the year 2000 will be comprised exclusively of women and children. Critical

Choices at 19.

Among the major factors contributing to the precarious financial position of women are pervasive sex discrimination and job segregation in the workforce. Women comprise 42% of the workforce nationwide. Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 3 Table 1 (1980). Yet, women are concentrated in a small number of occupations which are marked by low pay and limited opportunities. In 1981, half of the 43,000,000 women in the paid labor force were employed in only 20 occupations. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings (March, 1982). While 22% of all men were in three of the major occupation groups (sales, clerical and service), 64% of the women were employed in these occupations. Bureau of the Census, Wage and Salary Data from the Income Survey Development Program:

1979 3 (1982). There is evidence that the occupational segregation of women is increasing. For example, in late 1981 almost 75% of all clerical workers were women, Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 22 Table A-21 (1982), as compared with 62% in 1950. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment in Perspective: Working Women 1 (Report No. 544, 1978).

Further, the wages for "women's jobs" lag behind those categories that are traditionally male jobs. The 1977 weekly wage for 18 of the "women's jobs" ranged from $59 for private household workers to $171 for sewers and stitchers. Bureau of Labor Statistics, U.S. Dept. of Labor, News: Trends in Weekly and Hourly Earnings for Major Labor Force Groups, Tables 1-3 (Nov.2, 1977). In contrast, the 1977

average weekly wage for male-dominated jobs such as construction ($297), transportation and public utilities ($275), and motor vehicle retailers ($208) was far better. U.S. Comm'n on Civil Rights, Women Still in Poverty 19 (1979).[10/]

In view of persistent job segregation and the concomitant wage gap, it is not surprising that the median earnings of women in the paid work force is one half the median earnings of men. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Program: 1979 3, Table 1, pp. 11, 21.

10/ Even within predominantly female occupations, women's wages are significantly below those received by men. On average, a female sales worker, for example, is paid only 52% of wages paid to a male sales worker. Bureau of the Census, U.S. Dept. of Commerce, Money Income of Households, Families, and Persons in the United States: 1980 Table 55 (July, 1982). Female clerical workers receive only 59% of the wages paid to male clerical workers. Id.

The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity. It is only through assuring women truly equal access to jobs that we as a society can reverse these current trends and give women the real possibility of achieving economic self-sufficiency for themselves and their families.

In the instant cases, this Court is presented with some of the consequences of the pervasive history of race discrimination in employment in uniformed municipal services. No less severe, however, has been the systematic exclusion of women of all races from protective services jobs. The effects of the history of sex discrimination in protective services employ-

ment are being remedied very slowly.[11/] The ability of the federal courts to protect their remedial decrees, at issue in these cases, directly affects the ability of all women to obtain and maintain employment in state and local government services.

Women have been effectively barred from police, fire, and similar jobs by a variety of practices. One of the most common policies has been the complete segregation of women within the service, and their confinement to a few low-prestige jobs "appropriate" to their sex.

> [Women] were not permitted to compete with men on [police] entrance examinations. Their eligibility was limited to a relatively few

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11/ In New York City, for example, the qualifying test for firefighters was found to be sex discriminatory in 1982, N.Y. Times, Nov. 6, 1982, at p. 32, col. 5. The first women recruits for the New York City fire department entered training on September 22, 1982. N.Y. Times, Nov. 6, 1982, at p. 29, col. 3.

> positions as 'police women' and 'police matrons'. They were given limited responsibility, primarily for processing, searching and care and custody of women prisoners and a limited amount of youth work. They were not used for patrol work. United States v. City of Chicago, 385 F.Supp. 543, 548 (N.D. Ill. 1974)

Additionally, women have been required to meet stricter educational criteria than men, mandating more years of formal education than men, e.g., Schaefer v. Tannian, 394 F.Supp. 1128, 1130 (E.D. Mich. 1974) (police). Moreover, not only have women been relegated to sex-segregated jobs, some departments have maintained strict quotas on the number of women hired. Id. at 1131. Sex-segregated schedules of entrance examinations have also been maintained, affording women substantially fewer opportunities than men to apply for the handful of positions open to them. Id. at 1130.

As a result of these widespread discriminatory practices, the participation

of women in the uniformed state and municipal services has been extremely low. In 1960, women comprised only 4.1% of all workers in protective service occupations,[12] Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 10, Table 11 (1980). By 1981, the percentage had risen to 10.1%. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982). Since women now constitute more than 42% of the paid labor force, these percentages

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[12] The Bureau of the Census category of "protective service" work includes fire inspection and fire prevention occupations, firefighting occupations, police and detectives, sheriffs, bailiffs and other law enforcement officers, correctional institution officers, crossing guards, guards and police. Bureau of the Census, U.S. Dept. of Commerce, Classified Index of Industries and Occupations XIV (Nov. 1982).

reflect a gross underrepresentation of women.[13/]

Prior to 1972, when Title VII was amended to extend coverage to state and local government employment (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Sec. 701(f), 42 U.S.C. §2000e), women were hardly employed in the protective services at all. They constituted less than 3% of police, less than 5% of guards, and about one-half of one percent of all firefighters in 1972. Bureau of the Census, U.S. Dept. of Commerce, Statistical Ab-

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13/ The percentages of women in these occupations varies dramatically among occupations, although women are substantially underrepresented in all of them. In 1981, women constituted 0.9% of all firefighters, 5.7% of all police officers, 7% of all sheriffs and bailiffs, and 13.7% of all guards. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982).

stracts of the United States: 1981, 420 (1981).[14/]

Not surprisingly, since the enactment of the 1972 amendments, numerous cases alleging sex discrimination in protective services employment have been brought in the federal courts. A sampling of these cases shows a consistent pattern of denial of opportunities to women. In 1974, women constituted slightly over 2% of the police officers in Detroit, Schaefer v. Tannian, 394 F.Supp. at 1130; in 1973, women made up less than 1% of the police officers in Chicago, United States v. City of Chicago, 385 F.Supp. at 548; in 1974, none of the firefighters in 45 Louisiana municipalities and parishes were women, United States v.

14/ Figures for the category of "sheriffs and bailiffs" are not available for this period.

City of Alexandria, 614 F.2d 1358, 1365 n.14 (5th Cir. 1980). In 1979, only 2.3% of the police officers in the cities of Yonkers and White Plains, New York were women, Complaint, United States v. City of Yonkers, 80 Civ. 7407 (S.D.N.Y., 1979), although in 1977 more than 20% of the applicants for officer positions in White Plains were women. Stipulation, id. (April, 1981). In 1977, three out of 91 trainees in the Nassau County, New York police academy were women. Memorandum and Order, United States v. Nassau County Police Dept., No. 76 C1869, at 15 (E.D.N.Y. July 21, 1978).[15/] Women have not been comparably excluded from low-paid, low prestige civilian clerical and support jobs in the state and municipal services. In Nassau County, for example, in 1977 women constituted 0.6% of the sworn

[15/] The other 88 trainess were white men.

police department employees, but 78.9% of the civilian personnel in the department. Id. at 14.

Faced with such clear and dramatic evidence of sex discrimination, the federal courts have found liability and provided for effective relief, including percentage hiring goals. See, e.g., United States v. City of Alexandria, 614 F.2d at 1368 (consent decree covering police and firefighter hiring); Schaefer v. Tannian, 394 F.Supp. at 1135 (order covering police hiring); United States v. City of Buffalo, 633 F.2d 643, 647 (2d Cir. 1980) (order covering police and firefighter hiring); United States v. City of Philadelphia, 499 F.Supp. 1196, 1204 (E.D.Pa. 1980) (injunction covering police hiring). In so doing, the courts have recognized both the importance of opening municipal service employment to women and the necessity of court orders to

assure the initial and continuing availability to women of these fundamentally important employment opportunities. In remedying the effects of sex discrimination, like racial discrimination, rigorous judicial scrutiny and remedial action are the strongest tools to prevent backsliding and solidify the progress already made in the integration of municipal protective services.

POINT III

FEDERAL ANTI-DISCRIMINATION POLICY REQUIRES EFFECTIVE REMEDIES FOR EMPLOYMENT DISCRIMINATION BY GOVERNMENT EMPLOYERS

A. The 1972 Amendments to Title VII of the Civil Rights Act of 1964 Were Enacted to Redress Widespread Employment Discrimination In State and Local Government Employment

This Court has emphatically recognized that the intent of Congress, in enacting Title VII of the Civil Rights Act of 1964, was to "assure equality of employment opportunity and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). See also United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975);

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).[16/] Just over six years after the original Act was passed, Congress in 1972 reaffirmed its commitment to equal employment opportunity for all citizens, by amending Title VII to, inter alia, strengthen the enforcement powers of the Equal Employment Opportunity Commission and extend the provisions of the Act to employees of state and local governments. 86 Stat. 103, Sec. 701(f), 42 U.S.C. §2000e.

Explaining the need for these amend-

16/ The instant cases were brought on two different theories. The case involving the police department, originally Castro v. Beecher, 334 F.Supp. 930 (D.Mass. 1971), alleged violations of 42 U.S.C. §§1981 and 1983. The fire department case, Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507 (D.Mass. 1974) alleged both Title VII and constitutional grounds. Amici will focus their argument on the policy of the elimination of discrimination as expressed in Title VII, and respectfully refer the Court to respondents' brief for a full discussion of the constitutional issues.

ments, the House Report relied on a 1969 U.S. Commission on Civil Rights report [17] which found that "widespread discrimination against minorities exist[ed] in state and local government employment, and that the existence of this discrimination [was] perpetuated by the presence of both institutional and overt discriminatory practices." H.R. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2152.

The House Report further noted that this type of employment discrimination was "particularly acute and had the most deleterious effect," id. at 2153, since it was being practiced in the governmental activities that were "most visible to the minority communities (notably education, law enforcement, and the administration of

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[17] For All The People...By All The People, United States Comm'n on Civil Rights (1969).

justice)...." Id.

The Chairman of the Equal Employment Opportunity Commission voiced a similar concern in testimony before the House regarding the proposed amendments, noting that the "failure of state and local agencies to accord equal employment to their employees is particularly distressing in light of the importance that these agencies play in the daily lives of the local communities...." Equal Employment Opportunities Enforcement Act of 1971, Hearings on S.2515, 2619, H.R. 1746 Before the Subcomm. on Labor of Senate Comm. on Labor & Public Welfare, 92d Cong. (1971).

Nowhere are these concerns more evident or troublesome than in the continuing and almost total exclusion of women and minorities from local police and fire departments--agencies closely identified with

the overall protection of the public, and therefore perhaps the most visible of all.

B. Government Employment Practices, Such As Seniority-Based Lay-Off Plans, Cannot Be Allowed To Frustrate Efforts To Remedy Discrimination.[18]

1. The use of the "last hired-first fired" principle to reduce employment in times of economic recession has a disproportionate impact on minorities and women.

Despite the enactment of federal,

[18] Amici recognize, of course, the immunity afforded bona fide seniority plans under §703(h) of Title VII by this Court's ruling in Teamsters v. United States, 431 U.S. 324 (1977). At issue in these cases, however, is not the lawfulness, under Title VII, of the seniority provisions of the Massachusetts civil service law, Mass. Anno. Laws Ch. 31, §39 (Law. Co-op. 1982 Supp.), but rather the appropriateness, under Title VII remedial principles, of relief which implicates a seniority plan where employment discrimination has been found. Franks v. Bowman, 424 U.S. 747 (1976). It is in this context only that amici urge a temporary restructuring of the "last hired-first fired" principle.

state, and local statutes and presidential orders which prohibit discrimination in employment,[19] equal employment opportunity remains an unrealized goal for many of this country's minority and women workers. For these people, serious barriers to their entrance into the job market continue to exist. Significant among these is the "last hired, first fired" practice for structuring layoffs, which has disproportionately affected minorities and women, particularly during our nation's most recent economic troubles. As the

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[19] See, e.g., 42 U.S.C. §1981 (1981); 42 U.S.C. §1983 (1981); Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1981); Title VII, §701 et. seq. of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq. (1981); Exec. Order 11246, 30 Fed.Reg. 12319 (1965), as amended by Exec. Order 11375, 32 Fed.Reg. 14303 (1967); 42 U.S.C. §6705(f)(2)(1976 ed., Supp.II)(Public Works Employment Act of 1977).

United States Commission on Civil Rights pointed out in its 1977 Report Last Hired, First Fired: Layoffs and Civil Rights, (1977)(hereinafter Last Hired, First Fired):

> The long and extensive use of this policy by employers is one reason why income remains consistently lower and unemployment rates higher for these groups than for the labor force as a whole.

at 1. See Point II, supra.

Review of the impact of the 1974-75 recession on the employment status of minority and women workers highlights the devastating effects which can result from such layoffs. Between the end of 1973 and mid-year 1975, the unemployment rate for adult women rose steadily from 5.9% to 8.5%. Last Hired, First Fired, at 10. Jobless rates reached 14.3% for non-whites, and 12.4% for Hispanic workers by mid-1975, as compared to 8.2% for white work-

ers generally. Id.

Unemployment resulting from layoffs during that time period rose most sharply in those blue collar occupations where minority employees were most likely to be concentrated. Id. While the concentration of women workers in trade and services industries cushioned the impact of layoffs for women employees overall,[20/] nonetheless, women who had broken into traditional male jobs such as the assembly line of automobile plants or as patrol officers on police forces, were heavily affected by job loss. Id. Moreover, in some industries where minorities represented only 10-12% of the workforce, they accounted for 60-70% of those workers laid off in 1974. Id. at 24-25.

[20/] Cyclical changes in employment rates are generally less dramatic in trade and services than in goods-producing industries. Last Hired, First Fired at 11.

The impact of layoffs on government employees has been no less severe. For example, in mid-1975, the New York City Police Department laid off 371 of its 680 police officers, out of a force of almost 26,000. Id. Over half of all Hispanic workers in New York City lost their jobs between 1974 and 1975. Id. More recently, minority workers have accounted for 2335 of the 2944 layoffs of public sector employees ordered in Detroit between 1980-82. Bureau of National Affairs, Layoffs, Rifs, and EEO in the Public Sector: A BNA Special Report

(February 1982), at 23.[21]

In April 1975, the Department of Labor reported that "recently hired work-

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[21] Federal employees have fared no better. In 1981, 11,845 employees of the Federal government were laid off because of budget cuts. Bureau of National Affairs, Layoffs, Rifs, and EEO In The Public Sector: A BNA Special Report, February 13, 1982, p. 5. These layoffs were 50% higher for minority employees than non-minority employees. Id. Among administrative employees, women were laid off at a rate 61% greater than men; minority workers in administrative positions experienced layoffs at a rate 3.5 times the average rate. Id. In the first two quarters of 1982, 5321 federal employees were laid off; nearly 63% of these laid off employees were women, and women and minority men together comprised nearly 80% of the layoffs. Summary of Task Force RIF Survey, Quarter 1 and Quarter 2 Fiscal Year 1982. (Federal Government Service Task Force). In the third quarter of 1982, 1393 federal employees were laid off, 50.6% of whom were women. The combined percentage of women and minorities laid off was 70.9%. Reduction In Force Survey Third Quarter Fiscal Year 1982 (Federal Government Service Task Force).

ers, including many women and minority group members, have become early casualties of the economic downturn." Last Hired, First Fired, supra, p.10. Statistics reflecting the most recent federal layoffs, supra n. 21, demonstrate that the effects of the current recessionary cycle on the employment patterns of women and minorities are similarly disproportionate and injurious. Clearly, if affirmative measures designed to counteract these results are not instituted and adopted, "the opportunities [for women and minorities] laboriously created in the 70's may be destroyed during hard times in the 80's." U.S. Comm'n on Civil Rights, Affirmative Action In the 1980's: Dismantling The Process of Discrimination 36 (1981)(hereinafter Affirmative Action).

Strict adherence to the last hired,

first fired policy of layoffs "locks in" the effects of past discrimination by continuing the advantage white males gained in employment as a direct result of minimal or no competition from women and minorities in the past. Such adherence thus conflicts directly with the explicit intent of Congress in enacting Title VII and its subsequent amendments, to prohibit all forms of employment discrimination, and to provide sweeping remedial authority to the Courts to eradicate all present effects of both present and past discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added),

2. The lower courts' orders properly implemented the policy to remedy the effects of discrimination.

The powers of the district court to fashion a remedy for discrimination are

necessarily broad. "[W]here racial discrimination is concerned, the '[district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as ban like discrimination in the future.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)(quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)). See also Hills v. Gatreaux, 425 U.S. 284 (1976)(power to order metropolitan relief as remedy for unconstitutional housing segregation). In the instant cases, the lower courts entered a series of remedial orders designed to increase the minority representation among the police and firefighters in Boston in order to overcome the continuing effects of past discriminatory hiring practices in which the Boston Police and Fire Depart-

ments were found to have engaged.[22/] The trial court's subsequent modification of those orders to ensure their continuing effectiveness in the face of unexpected layoffs is being challenged here.

There is no question that the district court had inherent power to modify its equitable relief to adapt to new or changed circumstances. United States v. United Shoe Corp., 391 U.S. 244, 251 (1968); System Federation v. Wright, 364 U.S. 642, 647-48 (1961). Proposition 2 1/2 posed an unforeseen threat to the ongoing remedy. Failure to modify the prior remedial orders would allow the "substantial eradication of all progress"

22/ The necessity of orders setting goals for the hiring of minorities and women by employers who have discriminated has been recognized by lower courts consistently throughout the past decade. See, e.g., United States v. City of Miami, 614 F.2d 1322, 1335-36 (5th Cir. 1980), mod. in part on other grounds, 644 F.2d 435 (5th Cir. 1981), and cases cited therein.

achieved in the integration of the police and fire departments. Castro v. Beecher, 522 F.Supp. at 877. The court of appeals endorsed the views of the district court. Boston NAACP, 679 F.2d at 972.

In these circumstances, modification of the district court's prior decrees was appropriate in order to prevent the substantial undoing of the remedy. Brown v. Neeb, 644 F.2d 551, 560 (6th Cir. 1981); Perrotte v. Percy, 489 F.Supp. 212, 214 (E.D. Wisc. 1980); Bolden v. Pennsylvania State Police, 73 F.R.D. 370, 372 (E.D. Pa. 1976), aff'd 578 F.2d 912 (3d Cir. 1978).

The lower courts' decisions represent that "special blend of what is necessary, what is fair, and what is workable," Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), that characterizes equitable remedies. Thus, the order did not prohibit layoffs of sworn personnel altogether. Cf. Schaefer v. Tannian, 538 F.2d 1234

(6th Cir. 1976)(district court improperly enjoined layoff of male police officers; injunction against layoff of female officers was proper). It did not ban the layoff of all minority officers. The order did not require any additional measures of affirmative action, or require that white officers be replaced by new minority hirees. It merely sought to preserve the remedial status quo in the face of an unexpected fiscal exigency,[23/] and did not overbear "the interests of state and local authorities in managing their own affairs ..." Milliken v. Bradley, 433 U.S. 267, 281 (1977).

[23/] Indeed, as the court of appeals concluded, the district court's orders served the pressing public interest of maintaining integrated public safety departments in a major city with a large minority population. Boston NAACP, 679 F.2d at 977-78. Accord, Bridgeport Guardians, Inc. v. Members of the Bridgeport C.S. Comm'n, 482 F.2d 1333, 1341 (2nd Cir. 1973); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

The district court's reasonable modification of its prior orders is not invalid simply because it involved suspending the operation of the state's last-hired, first-fired layoff system, Mass. Anno. Laws ch. 31, §39 (Law. Co-op. 1982) Supp.). The mere existence of a seniority-based lay-off system cannot diminish "the scope of a district court's equitable powers to remedy past wrongs...for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). Nor is the scope of the remedial power under §706(g) of Title VII, 42 U.S.C. §2000e-5(g) (1981), limited or qualified by the Congressional policy expressed in §703(h) of Title VII, 42 U.S.C. §2000e-2(h) (1981), of protecting bona fide seniority systems from attack as discriminatory. Franks v. Bowman Transportation Co.,

424 U.S. 747, 758-59 (1976).

In Franks, this Court made clear that, in cases dealing with seniority systems, there is a significant "difference between a remedy issue and a violation issue," United Air Lines, Inc. v. Evans, 431 U.S. 553, 559 (1977).[24/] The instant cases do not attack the Massachusetts seniority-based plan itself as discriminatory. This clearly distinguishes them from the situation presented in Teamsters v. United States, 431 U.S. 324 (1977). Nor have respondents sought a determination that the Massachusetts layoff statute is invalid,

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[24/] Amici's discussion of Title VII in this section is not intended to imply that the issues addressed are precisely the same in both statutory and constitutional contexts. Rather, because of the explicit Congressional view embodied in §703(h), Title VII presents the strongest example of countervailing forces that could limit the remedial power of the district court. As amici demonstrate, infra, even viewed from the perspective of the policy of Title VII, the district court's orders were proper.

or asked for a remedy that permanently alters seniority.[25] Respondents, as well as the lower courts, focused exclusively on preserving the effectiveness of the remedy for the initial violation, discrimination in hiring. See Franks, 424 U.S. at 758.

The particular remedy crafted by the district court affects only that specific part of the Massachusetts civil service scheme that determines the order of layoffs, Mass. Ann. Laws ch. 31, §39 (Law. Co-op. 1982 Supp.). This circumscribed remedy is not foreclosed by this Court's decisions that have interpreted §703(h). Petitioners' sweeping claims that "employers are...not obliged to modify seniority-based layoff policies," Police Br. at 10, misconstrue both §703(h) and this Court's precedents. As enacted, §703(h) was an

[25] See Discussion at Point I, supra.

expression of federal policy to minimize government interference with the "system of industrial self-government," United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 580 (1960), created through collective bargaining contracts. See also American Tobacco Co. v. Patterson, 71 L.Ed. 2d 748, 760 (1982); Trans World Airlines v. Hardison, 432 U.S. 63, 79 (1977). In many such contracts, seniority plays a central role in the allocation of virtually all employment opportunities and benefits. The seniority systems examined by this Court have been the result of collective bargaining agreements, and typically have been of this all-encompassing variety. For example, the seniority system in Teamsters governed "vacations, pensions, and other fringe benefits," as well as "the order in which employees may bid for particular jobs, are laid off, or are recall-

ed from layoff." 431 U.S. at 343. See also United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 n.5 (1977)(wages, vacations, layoffs, flight assignments); TWA v. Hardison, 532 U.S. at 67 n.1.

By contrast, the layoff provision at issue in these cases is not the result of collective bargaining agreement. Nor is it part of a scheme in which seniority is of "overriding importance," Humphrey v. Moore, 375 U.S. 335, 346 (1964). Major aspects of Massachusetts civil service policy are based on grounds other than seniority. They include promotional examinations for the metropolitan district and capitol police forces (Mass. Ann. Laws ch. 31, §65 (Law. Co-op. 1982 Supp.)); transfers (ch. 31, §§35-36); preferences for disabled veterans (ch. 31, §26); and provisional

appointments (ch. 31, §§12-15).[26/] The Massachusetts statutory scheme, therefore, does not give seniority the central role that it has played in the collective bargaining context that Congress sought to protect by enacting §703(h). The district court, herein, properly acted to preserve the remedy of racially integrated police and fire services.

3. Courts must be free to impose affirmative color-conscious or gender-conscious remedies if they are to fully effectuate the broad public policy against employment discrimination.

In deciding that under §706(g) the provision of retroactive seniority was

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[26/] Even in those areas other than order of layoff where the statutory scheme uses seniority, it is not absolute, e.g. promotions to the next higher title in the same departmental unit, ch. 31 §8 (appointing authority may pick from among the three most senior qualified applicants).

"generally appropriate" as a remedy for hiring discrimination, Franks, 424 U.S. at 779, this Court carefully considered the effect of the remedy on other employees. It found "untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." 424 U.S. at 775. The Court recognized that retroactive seniority could affect the expectations and prospects of other employees, but concluded that the importance of the remedy was paramount. 424 U.S. at 777-78.

The result of the remedy approved in Franks is that white male workers who have been on the job for some time may find themselves, in hard times, losing economic benefits, or even being laid off, as a result of the seniority-based relief ordered. In the instant cases, the more senior white workers suffered the same

consequences as the Franks workers would have, had layoffs been required following the award of retroactive seniority. There can be no principled distinction drawn with respect to the consequences to white workers between the order in Franks and the order of the district court here.[27/]

Moreover, the fact that some individual white males may be disadvantaged by a court-ordered temporary bypass of strict seniority in times of layoffs should not preclude this Court from authorizing such affirmative relief. Affirmative measures and affirmative action plans which specifically provide for preferential treatment of victims of past discrimination are too deeply ingrained in established civil

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27/ Indeed, as noted in Point III.B.2. supra, the district court's order had less sweeping consequences. It affected only order of layoff, and not any of the other elements of employment that are affected by seniority.

rights law to be abandoned now. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980). For this Court to allow its determination of an appropriate remedy to be governed by the expectations of the individual white male officers laid off below, see Franks, 424 U.S. at 114, is to ignore the overall fairness of the plan, the actual discrimination experienced by minority officers, and the fact that affirmative measures "often produce changes in our institutions that are beneficial to everyone, including white males." Affirmative Action at 36.

Nor should this Court be troubled by assertions of "reverse discrimination" by opponents of such affirmative remedies. Such charges are mere smokescreens designed to undermine full and effective enforcement

of congressional intent to end race and sex discrimination in employment: "[T]he charge of 'reverse discrimination', in essence, equates efforts to dismantle the process of discrimination with that process itself. Such an equation is profoundly and fundamentally incorrect." Affirmative Action, at 41.

Adherents of color-blind or gender-neutral solutions to discrimination "[ignore] the context in which the problem of inequality has persisted in this country.. .." Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 214 (1980)(hereinafter Wright). Discrimination in employment cannot be equated solely with individual prejudice or expressions of bias. Affirmative Action, supra, at 2. Discrimination is "an interlocking process involving the attitudes and actions of individuals and the organi-

zations and social structures that guide individual behavior." Id. at 13. Though perhaps overtly racist, sexist, or bigoted, "they subordinate, exclude, segregate and deny equal opportunity almost as effectively as overt racist, sexist, and bigoted behavior." Id. at 2. "When these processes are at work anti-discrimination remedies that insist on 'color-blindness' and 'gender-neutrality' are insufficient." Id.

Moreover, it is clear that Congress, in enacting anti-discrimination legislation has rejected a "color-blind" or "gender-neutral" theory of government, and directed government to employ its power to eradicate it. As Judge Skelly Wright has emphatically remarked, "to call such legislation 'color-blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help." Wright, at 220-21.

Decisions of this Court demonstrate its agreement with, and adherence to, the principles outlined above. As Justice Blackmun stated in his opinion in Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978), "[i]n order to get beyond racism, we must first take account of race... And in order to treat persons equally, we must treat them differently. We cannot--we dare not--let the equal protection clause perpetuate racial supremacy." Likewise, in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Justice Brennan refused to adopt a literal interpretation of §§703(a) and (d) of Title VII, which would have necessarily prohibited all race-conscious affirmative action plans:

> The prohibition against racial discrimination in §§703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose... Examination of those sources makes clear

> that an interpretation of the sections that forbade all race-conscious affirmative action 'would bring about an end completely at variance with the purpose of the statute' and must be rejected.... (citations omitted)

See also Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding as constitutional a provision of the Public Works Employment Act of 1977 that required state or local governments to use 10% of federal funds granted for public works contracts to procure services or supplies from minority-owned or controlled businesses).

In the difficult economic circumstances we now face, the teachings of this Court's cases on the importance of remedying discrimination must not be forgotten.

> In this charged atmosphere, there is a strong temptation to view affirmative action as pitting the rights of minorities and women against white males in a battle over diminishing resources. The challenge, however, is to maintain, indeed, to advance our commitment to equality without asserting one equity over another.

Affirmative Action, at 6.

CONCLUSION

Because the cases before the Court no longer present any live controversy, they should be dismissed as moot. If the cases are found not to be moot, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DESCRIPTIONS OF AMICI CURIAE

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibit-

ing employment discrimination.

Equal Rights Advocates, Inc. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as amicus, in numerous employment discrimination cases.

The League of Women Voters of the United States is a nonpartisan, nonprofit membership organization, incorpo-

rated under the laws of the District of Columbia, with a current membership of 110,000 in 1400 state and local Leagues located in all states, the District of Columbia, Puerto Rico, and the Virgin Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination, and is committed to the eradication of discrimination against minorities and women through affirmative action.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center represents women's concerns before feder-

al administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Women Employed is a Chicago based organization with a membership of 3,000 women workers. Over the past nine years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

The Women's Division of the National Bar Association is an organization of over 3000 minority women lawyers, legislators, judges, and counselors. It has

as one of its purposes the enhancement and protection of the economic interest of minority women. It endorses the use of affirmative action plans as a viable means of correcting past discrimination and moving minority women up from the bottom rung of the economic ladder.

Women's Equity Action League is a national nonprofit membership organization dedicated to securing the legal and economic rights of women. The effective enforcement of civil rights laws has been a major priority of WEAL since its founding in 1968, particularly with respect to the remedy of employment discrimination through affirmative action.

Women's Legal Defense Fund is a nonprofit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been

discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

Nos. 82-185, 82-246, 82-259

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
vs.
BOSTON CHAPTER, NAACP, et al.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,
vs.
PEDRO CASTRO, et al.,
Respondents.

NANCY B. BEECHER, et al.,
Petitioners,
vs.
BOSTON CHAPTER, NAACP, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE OFFICERS FOR JUSTICE; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTER—SAN FRANCISCO CHAPTER; THE BLACK AGENDA COUNCIL; THE ASSOCIATION OF NORTHERN CALIFORNIA BLACK WOMEN LAWYERS; THE HONORABLE WILLIE L. BROWN; THE WILLIAM HASTIE BAR ASSOCIATION; THE CHARLES HOUSTON BAR ASSOCIATION; AND THE KAPPA ALPHA PSI FRATERNITY, IN SUPPORT OF RESPONDENTS

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Nos. 82-185, 82-246, 82-259

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

VS.

PEDRO CASTRO, et al.,
Respondents.

NANCY B. BEECHER, et al.,
Petitioners,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

INTEREST OF AMICI CURIAE

The common bond linking all amici in this brief is a commitment to the protection and advancement of the civil rights of minorities.

The instant case involves a federal court's exercise of discretion to prevent institutionalization of past discriminatory employment practices. Amici believes that this appeal is moot, but in the event that the Court reaches the merits, it is imperative that it affirm the trial court's

authority to modify its consent decrees in the way it did. In a time of deep recession and shrinking economic resources, black Americans and other minority groups already experience a disproportionately high level of unemployment. These groups cannot afford to undergo, and they should not be required to undergo, layoffs which would eliminate recently acquired civil rights gains and reinstate the discriminatory, status quo ante.

Officers for Justice is an organization comprised of minority members of the San Francisco Police Department and was formed in order to deal with the issue of minority underrepresentation in the San Francisco Police Department and to combat discrimination aimed at those minorities who are members of the police force. The organization has been involved in landmark litigation aimed at desegregation of the police force of San Francisco and has obtained a consent decree providing for affirmative action in the hiring and promotion of police officers. The preservation of the remedial impact of consent decrees designed to eliminate the present effects of past discrimination is of continuing concern to this organization.

The International Association of Black Firefighters-San Francisco Chapter—is an organization of black professional firefighters which recruits blacks into the fire department, assists blacks in achieving promotions within the department, and makes the fire service more relevant to the needs and aspirations of Blacks and of other minority citizens within San Francisco.

The Black Agenda Council which was established in 1982 is a San Francisco network of elected and appointed officials representing more than 30 black organizations. The Council is concerned with all issues affecting blacks in San Francisco and across the country and regards the issue of black employment as of paramount concern.

The Association of Northern California Black Women Lawyers represents the interests of black women lawyers.

The Association is vitally concerned with the advancement of all minority Americans.

The Honorable Willie L. Brown is the Speaker of the Assembly of the California State Legislature. He is appearing here in his individual capacity. His legal and political career has been devoted in large part to promoting equal opportunity for minority Americans including equal employment opportunities.

The William Hastie Bar Association is an organization of San Francisco-based black attorneys which includes increased employment opportunities for black Americans as one of its goals.

The Charles Houston Bar Association is the oldest association of black attorneys in Northern California. The Association has filed a number of amici briefs before this Court on a variety of issues affecting the black community. Named after one of the most distinguished deans of Howard University Law School, the Association strives to use the talents of black attorneys to advance the general interests of black Americans.

The Kappa Alpha Psi Fraternity is an organization of some 70,000 black Americans concerned with all aspects of minority affairs in this country. Long active in struggles aimed at improving the lot (economic and otherwise) of black Americans, Kappa Alpha Psi believes that the future of consent decrees designed to alleviate the effects of past discrimination is of critical importance to its membership and to all black Americans.

Because of their involvement in efforts to ensure equal employment opportunity for minority Americans and because it is their belief that the District Court's modification of the consent decrees herein was an essential step in the process of realizing this goal, amici file this brief in support of respondents.[1]

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[1]The parties' letter of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

ARGUMENT

I.

THIS APPEAL IS MOOT

A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, ... U.S. ....., 102 S.Ct. 1181, 1182-83, ... L.Ed.2d ..... (1982); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). On this appeal, petitioners complain that the District Court's modification of its original consent decrees wrongfully deprived certain white protective service employees of their jobs in 1981. Subsequent to this Court's grant of the writs of certiorari, the Boston police and fire departments reinstated all laid off personnel and thereby mooted this appeal.

Petitioners would have this Court believe that this appeal encompasses the issues of backpay and seniority credit for the period covered by the allegedly wrongful furloughs. No such claims were raised in the courts below, though they could *easily* have been anticipated and argued. Rather, petitioners limited their arguments to the proposition that the District Court's modification of the original consent decrees should be vacated so that certain white protective service employees could be recalled to their jobs. This is precisely what has occurred since this Court granted certiorari. This appeal is therefore moot. *DeFunis v. Odegaard*, 416 U.S. 312, 316-17 (1974).

II.

THE DISTRICT COURT ACTED PROPERLY IN MODIFYING THE ORIGINAL CONSENT DEGREES

A. The District Court Was Authorized To Modify The Original Consent Decrees Because Of Changed Circumstances

Since the original consent decrees were directed to future events which could not fully be anticipated at the time the decrees were entered, the District Court appropriately retained jurisdiction to shape, revise or modify the decrees. As this Court recognized in *United States v. Swift*, 286 U.S. 106, 114 (1932), "[a] continuing decree or injunction directed to events to come is subject to adaptation as events may shape the need." The Court reasoned that:

> [C]onsent is to be read as directed toward events as they were then. It was not an abandonment of a right to exact revision in the future, if revision should become necessary in adaptation to events to be." 286 U.S. at 115.

Accord, United States v. United Shoe Machinery Corporation, 391 U.S. 244, 248 (1968); *Federation v. Wright*, 364 U.S. 642, 647 (1961); *Chrysler Corporation v. United States*, 316 U.S. 556, 562 (1942).

The District Court's modification of the original decrees was not just authorized, it was *required*. After finding that minorities were severely underrepresented in the Boston police and fire departments as a result of discriminatory conduct and after approving consent decrees which required that this situation be corrected in the future, the District Court was obligated to ensure that the City of Boston complied with the original decrees with all deliberate speed.

As this Court held in the antitrust case of *United Shoe, supra*, 391 U.S. at 252, a district court, upon an appropriate

finding that unlawful practices had not been eliminated, should modify a consent decree "to achieve the required result *with all appropriate expedition*" (emphasis added). In *United Shoe*, the district court denied the government's petition for a modification of a consent decree, even though the government demonstrated that the defendant was still engaged in monopolistic practices. This Court reversed after concluding that it was "the duty of the court to prescribe relief which will terminate the illegal monopoly, deny the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." *Id.* at 250. Similarly, in *Federation, supra*, 364 U.S. 642, the District Court's denial of a union's motion to modify a consent decree was held by this Court to constitute an abuse of discretion.

Where, as here, the District Court has granted a request for modification of a consent decree after a full evidentiary hearing, the propriety of the modification is tested by determining whether it "effectuates or thwarts the basic purpose of the decree." *Chrysler, supra*, 316 U.S. at 562. In this case, the District Court's action not only promoted the objectives of the original decrees but was absolutely required in order to prevent those decrees from being rendered meaningless.

Thus, the original consent decrees called for a substantial increase in the percentage of minority police officers and firefighters in Boston and established as a target the level of minority representation in the City of Boston. *Boston Chap., NAACP v. Beecher*, 679 F.2d 965, 968, 969 (1 Cir. 1982) [hereinafter cited as "NAACP v. Beecher"]. Compliance with these decrees produced significant improvement in the level of minority representation in both departments, although it still remained well below the target established in the decrees. *Id.* at 970.

The proposed layoffs according to strict seniority would have rolled back minority representation in both depart-

ments substantially. *Id.* Not surprisingly, both of the courts below concluded that the only effective way to preserve the viability of the original decrees was to limit the extent to which minorities could be laid off. *Id.* at 977; *Castro v. Beecher,* 522 F.Supp. 873, 877 (D. Mass. 1981).

B. The District Court's Modification Of The Original Consent Decrees Was Not Barred By Section 703(h) Of Title VII

Petitioners invoke section 703(h) of Title VII (42 U.S.C. 2000e-2(h)) as the basis for their argument that the District Court had no authority to override the Massachusetts seniority statute (Mass. Gen. Laws c. 31, et seq.) in order to effectuate the original consent decrees. The police case did not, however, involve Title VII at all and Title VII was not the principle statute involved in the fire case. In both cases, 42 U.S.C. § 1981 was the key statute as the Court of Appeals' opinion clearly indicates. *NAACP v. Beecher, supra,* 679 F.2d at 967, 968.

Conceding this, as they must, petitioners assert that Title VII and 42 U.S.C. § 1981 are identical statutes and that the limitations on the relief available under the former necessarily operate to limit the relief available under the latter, even where the relief in question is the product of consent decrees *voluntarily* entered into by the parties. Significantly, petitioners make no effort to support these contentions with citations to the legislative history of Title VII, undoubtedly because it offers them no comfort.

In *Bolden v. Pennsylvania State Police,* 578 F.2d 912 (3 Cir. 1978), a similar argument was made and rejected on the ground that the legislative history of Title VII did not support the proposition that section 703(h) limited the relief available under 42 U.S.C. § 1981. There, an association of state police officers sought modification of an affirmative action consent decree that eliminated seniority from the criteria relevant to promotion decisions. The

association argued that three cases decided under section 703(h) after the consent decrees were entered rendered the decrees unlawful. In rejecting the argument, the court observed that:

> [*T*]*he statute involved in the three recent decisions, Title VII . . ., was not the predicate for relief in this case. Before we could find those cases relevant here, we would have to impute to the Second Session of the Eighty-eighth Congress the intention to circumscribe the remedial powers of the federal court under §§ 1981, 1983, 1985 and 1988.* We find nothing in *Franks . . . , International Brotherhood of Teamsters . . .*, or *United Airlines, Inc. v. Evans* to support such a construction of 703(h) of Title VII. *Nothing in the legislative history of that section supports it.* 578 F.2d at 921 (emphasis added).

Petitioners stress that it is "illogical" for the remedial powers of the federal courts under section 1981 to be treated any differently than their remedial powers under Title VII but they offer no explanation for the fact that Congress failed to follow their "logic" by explicitly limiting the remedial powers of the courts under section 1981 to the types of remedies available under Title VII. This Court's decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), makes it clear that the two statutes are distinct and that the scope of the courts' remedial powers under section 1981 cannot be determined by extrapolation from Title VII. "[*T*]*he remedies available under Title VII and under § 1981*, although related, and although directed to most of the same ends, *are separate, distinct, and independent.*" 421 U.S. at 461 (emphasis added).

Petitioners' claim that the District Court's modification of the original consent decrees was prohibited by section 703(h) of Title VII is defective for the additional reason that Title VII does not limit, and cannot be construed to limit, the scope of relief which the parties to an action can voluntarily decide upon. The court in *EEOC v.*

Safeway Stores, Inc., 611 F.2d 795 (10 Cir. 1979), addressed this issue and concluded that a consent decree was not objectionable simply because it provides more relief than Title VII provides. In that case, individual members of a union sought to modify an affirmative action consent decree on the ground that the decree exceeded the relief provided for in Title VII. The appellate court concluded that the trial court had properly refused to modify the consent decrees.

> [T]o argue that the terms of a consent decree may not vary from the statutory limits of Title VII is to misconceive the nature of consent decrees and to ignore the strong policy embodied in Title VII in favor of voluntary settlements. . . .
>
> It is not the purpose of Rule 60(b) or the inherent powers of chancery to allow the modification of a consent decree merely because it reaches a result which could not have been forced on the parties through litigation. 611 F.2d at 799-800 (citations omitted).

Thus, the mere fact that original consent decrees afford more relief than might have been allowed in a fully litigated case does not render the District Court's decision to preserve the decrees improper.

C. A Finding Of Intentional Discrimination Was Not A Prerequisite For The District Court's Modification Of The Original Consent Decrees

Petitioners do not, for obvious reasons, go so far as to attack the validity of the original consent decrees.[2] They

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[2]None of the original defendants in these cases and none of the unions has ever filed a motion for relief from the original consent decrees. On that basis alone, petitioners would be barred from collaterally attacking the decrees on this appeal. *Cf., Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940). In addition, however, an intervening change in the law concerning proof of liability under 42 U.S.C. § 1981 does not support the type

do, however, argue that by virtue of this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), the District Court could not "extend" the relief of the original decrees by limiting layoffs of minority protective service employees. According to petitioners, this "additional" relief cannot be granted absent a finding of intentional discrimination. This argument necessarily depends on the assumption that the District Court did something other than enforce the explicit terms of the original decrees, an assumption which is completely untenable.

The original decrees embody agreements between the parties that certain steps would be taken to improve minority representation in the Boston police and fire departments, including accelerated minority hiring. The decrees establish a goal in this regard—i.e., minority representation in these departments was to be increased until it approximated the level of minority representation in the City of Boston. The agreements are not contingent upon the state of the law under 42 U.S.C. § 1981 or under any other statute. There are no provisions in the decrees which excuse failure to perform whether it is caused by financial necessity or by any other circumstance.

The City of Boston's proposed program of layoffs according to strict reverse seniority would have violated the original consent decrees in two respects. First, the proposed layoffs would have deprived minorities of the relief provided thusfar by depriving them of their jobs. Second, the proposed layoffs would have blocked the prospective relief called for by the decrees by hampering the effort to increase minority representation in the police and fire

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of relief petitioners seek on this appeal—layoffs of minorities hired pursuant to the original decrees. Precedential evolution, standing alone, will not justify recision of relief already provided. *EEOC v. Safeway Stores, Inc.*, 611 F.2d 799, 800 (10 Cir. 1979); *Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3 Cir. 1977).

departments to the level of minority representation in the surrounding community. Even assuming that the proposed layoffs are not motivated by an intent to discriminate against minorities, this is totally irrelevant because nothing in the original consent decrees excuses any failure to perform.

On virtually identical facts, the court in *Bolden v. Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976), rejected the contention that absence of an intent to discriminate excused conduct on the part of the defendants that violated the terms of a consent decree. There, personnel reductions were interfering with the affirmative action plan required by the decree and a modification of the consent decree was sought to correct the situation. The defendants in *Bolden* argued, as petitioners do here, that the modification of the decree was impermissible under *Washington v. Davis* because there was no proof that the reductions in force were motivated by an intent to discriminate against minorities. The district court dismissed this contention.

> *It is important to point out that plaintiffs do not require a remedy for acts of discrimination subsequent to the Decree. Plaintiffs seek only a modification of the Decree in order to remedy pre-decree deprivations of their constitutional rights* by admittedly racially discriminatory conduct on the part of the State Police. *Certainly under the facts of this case, Washington v. Davis is inapposite.* 73 F.R.D. at 371-72 (emphasis added).

Similarly, in *Sarabia v. Toledo Police Patrolman's Association*, 601 F.2d 914 (6 Cir. 1979), a district court's modification of a consent decree was upheld notwithstanding a purported change in the law since the decree was entered. In *Sarabia*, a union claimed that *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), required proof of intent to

discriminate before the consent decree could be modified to limit layoffs of minorities. In rejecting the argument, the appellate court observed:

> It is hard to understand how these decisions could be applied to a case involving a consent decree. Here, the parties agreed that certain steps would be taken "to erase any vestiges of past employment discrimination. . . ." When this agreement was submitted and entered by the court as a consent decree all issues of proof were dispensed with. *Whatever may have been the understanding of the parties with respect to the requirements for proving a constitutional violation at the time of the decree, they all agreed upon a course of conduct to bring about a better representation of minority groups on the Toledo police force.* This agreement was solemnized at their request by entry as an order of the district court. *The district court did not violate Washington v. Davis or Arlington Heights by entering a subsequent order to effectuate the stated goal of the consent decree.* 601 F.2d at 919 (emphasis added).

Stotts v. Memphis Fire Department, 679 F.2d 541 (6 Cir. 1982), also addresses this issue and reaches the same conclusion as the courts in *Bolden* and *Sarabia*. In *Stotts*, the City of Memphis argued that the district court erred in modifying affirmative action consent decrees and limiting proposed layoffs of minorities. The City's position was that it should be excused from performance of the obligations set forth in the original decree because the layoffs were precipitated by a fiscal crisis. The appellate court affirmed the district court's modification of the decree. It concluded that the announcement of the proposed layoffs "was in effect notice of the City's intended anticipatory repudiation of the 1974 and 1980 Decrees" in that ". . . relief previously granted pursuant to the Decrees would be diminished and . . . prospective relief under the Decrees

would not be forthcoming." 679 F.2d at 561. The appellate court went on to hold that:

> *Plaintiffs were presumptively entitled to full performance of the terms of the Decrees.* Therefore, the court's modification of the [decrees] is simply an exercise of its equity jurisdiction to temporarily relieve the hardship on the City which strict compliance with the decrees would have caused. The modification allows the City to proceed with its layoff policy subject to reasonable deference to its obligations under the decrees. *Id.* at 562 (emphasis added).

The instant cases are not different in any significant respect from the cases discussed above. The City of Boston made a commitment to increase minority representation in the police and fire departments and, just as it had begun to fulfill its obligations, it attempted to renege on its agreement because of an asserted fiscal crisis. Nothing in the original consent decrees excused such an attempted repudiation of the City's obligations and, in particular, no provision limits the decrees to situations in which the City is motivated by an intent to discriminate. It was therefore no violation of *Washington v. Davis* to modify the decrees and limit layoffs of minorities.

Petitioners' reliance on *Washington v. Davis* is mi[illegible]d for an additional reason: it is distinguishable from the cases at bar. The sole issue before this Court in *Washington* was whether proof of intentional discrimination is required in order to establish a violation of the Equal Protection Clause. The plaintiffs in *Washington* alleged violations of 42 U.S.C. § 1981 but, on appeal, only raised the Equal Protection Clause issue. "Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, *which rested on purely constitutional grounds,* should have been granted." 426 U.S. at 236 (emphasis added). The appellate court reversed the

district court and, when it, in turn, reversed the appellate court, this Court stated that its decision was based upon the fact that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the *constitutional* issue before it." *Id.* at 238 (emphasis added).[3]

There is no constitutional claim under the Equal Protection Clause in either of the cases at bar. They were brought only under 42 U.S.C. § 1981 and Title VII. *Washington* cannot be construed to apply to cases brought under either of those statutes and the court in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9 Cir. 1977), agrees.

> It is significant that throughout this discussion of "constitutional standards" and "Constitution-based claims" the Court [in *Washington v. Davis*] mentioned neither § 1981 nor cases construing that statute. Nor can it be said that in resolving the equal protection question before it, the Court necessarily resolved the § 1981 claim on the same basis. 566 F.2d at 1339-40 (footnotes omitted).

See also, Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (plaintiff not required to meet burden of proof enunciated in *Washington v. Davis* when action is based upon Title VII and 42 U.S.C. § 1981).

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[3]The fact that *Washington* only concerns a question of constitutional law is even more explicit in this passage from this Court's opinion: "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than that of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone it does not trigger the rule, . . . that racial classifications are to be subjected to the strictest scrutiny and are justified only by the weightiest of considerations." 426 U.S. at 242.

III.

USE OF RACE-CONSCIOUS REMEDIES TO ELIMINATE THE EFFECTS OF PAST RACIAL DISCRIMINATION IS NOT CONSTITUTIONAL

Invoking the Fourteenth Amendment of the Constitution, petitioners assert that the District Court's use of race-conscious guidelines in setting limitations on the layoffs planned by the City of Boston was a violation of the constitutional rights of white protective service employees. The implication of petitioners' argument is that there is something unprecedented about the District Court's use of race-conscious guidelines in resolving the layoff problem. Nothing could be further from the truth.

To begin with, the Constitution does not require the courts to ignore race when fashioning remedies for past discrimination. As the court in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5 Cir. 1966), *modified on other grounds*, 380 F.2d 385 (5 Cir.), *cert. denied*, 389 U.S. 840 (1967), eloquently observed:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color-blind. But *the Constitution is color conscious to prevent discrimination being perpetuated and to unduo the effcts of past discrimination.* 372 F.2d at 876, (emphasis added).

Similarly, in *Stotts, supra*, the court pointed out that:

> "No decision of the Supreme Court has ever adopted the proposition that the Constitution must be color-blind. . . . *On the contrary, the Supreme Court has approved race-conscious affirmative action in a wide variety of situations where it is an attempt to amelio-*

rate the effects of past discrimination." 679 F.2d at 553 (emphasis added, citations omitted).

Thus, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-25 (1971), this Court rejected the argument that the courts are required to act in a color-blind fashion when formulating school desegregation remedies on the ground that consideration of race is an unavoidable starting point when fashioning such remedies. Similarly, in *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), the Court observed that the process of fashioning remedies for discrimination in the schools will "almost invariably" include student assignments based upon race and that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."

The importance of race-conscious remedies in alleviating the effects of past discrimination was unequivocally demonstrated when this Court struck down a state law that absolutely prohibited assignment of students on the basis of race because the law interfered with the implementation of desegregation plans designed to remedy racial discrimination. *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971).

Consistent with the foregoing, the courts have routinely used race-conscious remedies in alleviating racial discrimination in employment contexts. *See e.g., Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) *Talbert v. Richmond*, 648 F.2d 925 (4 Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Valentine v. Smith*, 654 F.2d 503 (8 Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6 Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

Of course, race-conscious remedies are not constitutionally permissible in every situation. Such a remedy must be necessary to effectuate a compelling governmental inter-

est. In the case at bar, however, the District Court's use of race-conscious guidelines in establishing limitations on the layoffs was definitely related to a compelling governmental interest and was absolutely required to effectuate the original, remedial decrees.

The original decrees were designed to eliminate the massive racial imbalance existing in the Boston police and fire departments as of 1974. Where, as here, racial imbalance is a function of discriminatory conduct, the objective of alleviating that imbalance is not only constitutionally permissible but is also *affirmatively required. Stotts, supra*, 679 F.2d at 553; *Talbert, supra*, 648 F.2d at 931; *Detroit Police Officers' Association, supra*, 608 F.2d at 694-98; *Baker v. City of Detroit*, 483 F.Supp. 930, 988 (E.D. Mich. 1979).

The race-conscious guidelines adopted by the District Court were also necessary to preserve the objective of correcting racial imbalance in Boston's protective service departments. Preservation of the status quo was not an excessive grant of relief given the fact that minority representation was already well below the target established by the original consent decrees and would have dipped even further if layoffs according to strict reverse seniority had been permitted. In situations like this, where racial imbalance is highly disproportionate, the use of race-conscious remedies is viewed as particularly appropriate. *Stotts, supra*, 679 F.2d at 553.

Petitioners assert that the District Court went beyond permissible constitutional boundaries in two respects. First, they contend that the District Court improperly acted to preserve the effect of its original decrees because the City's proposed layoffs according to strict seniority were not motivated by an intent to discriminate against minorities. As Section I(C) of this brief establishes, however, a finding of intentional discrimination is not necessary in order to enforce the specific terms of the original

consent decrees and *Washington v. Davis, supra*, 426 U.S. 229 (1976), does not support petitioners' argument to the contrary.

Second, petitioners claim that the District Court exceeded what it was permitted to do under the Constitution because its modification of the original consent decrees operates to preserve the jobs of minority officers and firefighters who may not have been victims of the discriminatory tests and eligibility lists utilized prior to 1974. They characterize the District Court's action as a grant of "constructive seniority" and argue that such an award is impermissible absent a finding that the minorities protected by the decrees are the same people who were victimized prior to 1974. Petitioners misconceive both the nature of the problem which the District Court was attempting to correct and the nature of the remedy which the District Court adopted in order to resolve the problem.

The *problem* is racial imbalance not racial discrimination against specific individuals. The *solution to the problem* is, at the very minimum, to preserve the gains made thusfar by minorities as a group. In this situation, "[t]he societal interest in eliminating employment discrimination is 'sufficient in itself to justify relief directed at classes rather than individual victims of discrimination. . . .'" *Baker, supra*, 483 F.Supp. at 993, *quoting, EEOC v. A.T.&T. Co.*, 556 F.2d 167, 175 (3 Cir. 1977), *cert. denied sub nom, Communications Workers of Am. v. EEOC*, 438 U.S. 915 (1978). Here, the District Court had the additional justification that the parties *agreed* to class relief without limiting it to identifiable victims of the discriminatory evidence. *See*, Section II(B), *supra*.

IV.

THE DISTRICT COURT'S MODIFICATION OF THE CONSENT DECREES DID NOT UNREASONABLY INTERFERE WITH THE RIGHTS OR EXPECTATIONS OF WHITE PROTECTIVE SERVICE EMPLOYEES

A. The Seniority Rights Of White Protective Service Employees Were Tainted By Discriminatory Hiring Practices And The Continuing Effects Thereof

In making the claim that the District Court improperly applied the balancing test, petitioners shape their arguments as if the seniority rights of white protective service employees in Boston accrued in a vacuum. They assume, and invite this Court to assume, that these seniority rights were accumulated in a racially-neutral fashion. From this premise, petitioners proceed to the conclusion that the purportedly "neutral" seniority rights of white protective service employees outweigh the public interest in desegregation of the Boston police and fire departments.

Petitioners overlook the fact that, *but for* the discriminatory hiring practices which triggered this litigation and *but for* the continuing effects of that past discrimination, the distribution of seniority rights between white and minority protective service employees would be far different from that in existence in 1981. As the Court of Appeals observed in its opinion below, "whites as a group reaped significant advantages in the past in promotion and hiring at the expense of blacks and hispanics. . . ." *NAACP v. Beecher, supra,* 679 F.2d at 977. One of the *most* significant advantages conferred upon this group was preferential position on the seniority lists.

The small group of minority police officers and firefighters currently employed by the City of Boston were the "last hired" for the sole reason that no appreciable number of minorities were hired before 1974 as a result of a discriminatory set of hiring practices. Thus, the disparity in

starting dates between white and minority protective service employees is nothing more than the mirror image of the discriminatory conditions which existed prior to 1974.

It follows from the foregoing that although the concept of seniority (i.e., classification of employees based on time in service) may be facially-neutral, its application in this case is not. The distribution of jobs between whites and minorities was drastically skewed *in favor of whites* prior to 1974 because of discriminatory conduct. After 1974, starting dates continued to reflect the old discriminatory conditions notwithstanding the remedial impact of the consent decrees. Thus, "time in service" is tainted by the past discrimination and the proposed layoffs based upon "time in service" would have been equally tainted.

B. The District Court Correctly Concluded That The Interest Of White Protective Service Employees In Their Seniority Rights Are Outweighed By Other Considerations

It should be reiterated that the original consent decrees were designed to alleviate the massive racial imbalance in the Boston police and fire departments which was the result of discriminatory hiring practices. *NAACP v. Beecher, supra,* 679 F.2d at 976. The layoffs threatened the objective of the original decrees—i.e., racial balance—because they were to be based upon criteria which mirrored the imbalance existing prior to 1974. Those criteria are the very seniority rights championed by petitioners on this appeal and therefore carry little weight in deciding whether the District Court's limitation on the layoffs was appropriate.

The fact that white protective service employees may have formed expectations concerning their seniority rights which went unfulfilled because of the District Court's action adds nothing to petitioners' position. A similar argument was made and rejected in *Franks, supra,* 424 U.S. 747. There, an employer sought to avoid giving retroactive

seniority to a class of discriminatees on the ground that such relief would conflict with the economic interests of other employees. 424 U.S. at 773. This Court, speaking through Mr. Justice Brennan, rejected the argument on the ground that:

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII. . . . [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. *Id.* at 774-75.

Petitioners' claim that the District Court's modification of the consent decrees unduly interfered with the expectations of white protective service employees is particularly unpersuasive given the fact that those expectations arose out of the discriminatory state of affairs which existed prior to 1974. The court in *Baker, supra,* 483 F.Supp. 930, reached the same conclusion about an identical argument. There, white police officers challenged a voluntary affirmative action plan calling for realignment of seniority rights between white and minority officers. In rejecting the plaintiffs' claim that the City's action unduly interfered with their legitimate expectations, the Court observed: "It is true that affirmative action upsets the expectations of white workers, but *such expectations are indeed tainted when they are based upon a legacy of discrimination.*" 483 F.Supp. at 1002 (emphasis added). The court went on to point out that white officers had received an unexpected "bonus" when the police department gave them unearned promotions in 1970 as part of the discriminatory conduct and it held that "[w]hite officers cannot reasonably complain when the

Department, on a finding of past discrimination and operational need, decided to confer a 'bonus' on blacks in 1974 and subsequent years." *Id.*

Similarly, in *Stotts, supra,* 679 F.2d 541, the court rejected the proposition that a consent decree which accelerated minority eligibility for promotions unduly interfered with the expectations of non-minorities. The court observed that "[a] simple reduction in the 'expectations' [of non-minorities] does not . . . necessarily make a consent decree unreasonable" and it went on to hold that the harm suffered by incumbent non-minority employees because of the promotional goal was de minimus. 679 F.2d at 556.

> Non-minorities allege that the 1980 Decree's 20% promotion goal unduly interferes with their expectations of promotion. It appears, however, that the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been non-discriminatory. The 1980 Decree eliminated only *a portion* of the promotional expectations of non-minorities which were presumptively based on the City's discriminatory promotional practices. *Id.* (emphasis in the original).

Here, as in *Baker* and *Stotts*, the expectations of white protective service employees are based upon a pre-decree situation caused by discriminatory conduct and the lingering effects of that situation. To the extent that the District Court's limitation on layoffs interfered with those expectations, it did not adversely affect any legally protected interest of white employees. As the Court of Appeals for the Second Circuit observed in discussing Title VII, "[i]f relief . . . can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States v.*

Bethlehem Steel Corp., 446 F.2d 652, 663 (2 Cir. 1971). *Accord, Franks, supra,* 424 U.S. at 775.

Petitioners seek to bolster their arguments by asserting that the white protective service employees affected by the District Court's restrictions on layoffs are innocent of any discriminatory conduct. Assuming *arguendo* that this is the case, even innocent white employees must bear their fair share of the burdens involved in alleviating the effects of past discrimination. As Mr. Justice Brennan wrote in *Franks, supra*, "a sharing of the burden of the past discrimination is *presumptively* necessary" and "is entirely consistent with any fair characterization of equity jurisdiction." 424 U.S. at 777 (emphasis added). Similarly, this Court, speaking through Mr. Chief Justice Burger, held in *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980), that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . 'a sharing of the burden' by innocent parties is not impermissible."

In view of the foregoing, any comparison of the benefits to be derived by white employees from enforcement of their seniority rights on the one hand and the public benefit in racially balanced police and fire departments on the other must result in the conclusion that the public benefit is by far the overriding consideration. To begin with, desegregation of this society's major institutions is a great national policy of the highest priority. *Franks, supra*, 424 U.S. at 779. Desegregation of the institutions involved in this litigation is particularly important because they are *public* entities charged with the responsibility of protecting the lives and the property of the citizens of Boston.

> [*P*]*erhaps the most critical consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal employment opportunities. This is a police department* and the visibility of the black patrolmen is a decided ad-

> vantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2 Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (emphasis added).

The court in *Detroit Police Officers' Association, supra*, 608 F.2d 671 explained the nature of the benefits to be derived from racially balanced protective service departments as follows:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to public's desires. Rather, it is that *effective crime prevention and solution depends heavily upon public support and cooperation which result only from public respect and confidence in the police.* In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. 608 F.2d at 696 (emphasis added).

Even the United States Department of Justice, appearing herein as an amicus curiae for petitioners, recognizes that racially balanced protective service departments promote vital governmental interests.

> Ideally, every city's police department should reflect the racial-ethnic make up of the community. . . . [P]olice should make every effort to develop a representative force. United States Department of Justice Community Relations Service, *Police Use of Deadly Force: A Conciliation Handbook for Citizens and the Police* at 16 (1982).

Layoffs of minority protective service employees in derogation of affirmative action consent decrees would completely frustrate efforts to desegregate police and fire departments and thwart efforts to improve police and fire

protection in ethnically mixed communities. Moreover, such layoffs would contribute to the devastating economic crisis plaguing minority groups in this country.

In the current, depressed, economic climate, minorities are experiencing the highest levels of unemployment they have had to endure in the past twenty five years and they are experiencing unemployment at a much higher rate than whites. At the end of the first year of this recession, 18.5% of the minority population of the country was unemployed while unemployment among whites was 8.4%. *See*, Exhibit A, *infra*, at page 27.[4] During the first year of the recession, minorities lost their jobs at a rate 1.77 times faster than whites. *Id.*

Significantly, minorities do not return to the work force during recoveries as quickly as they leave it during the recessions. During the years 1957-82, minorities were generally the first fired during recessions and the last rehired in the recoveries. *Id.*[5] For example, during the 1973-75 recession, minorities lost their jobs 1.75 times faster than whites. During the 1975-80 recovery period, however, minorities returned to work only .89 times as fast as whites. *Id.* In the last recovery period (1980-81), the recovery rate in the minority labor force was so sluggish that minorities were *losing their jobs* 1.4 times faster than whites were *obtaining* jobs. *Id.*

The history of the recovery periods demonstrates that minorities cannot be laid off in a recession on the assumption that they will be rehired or will find new jobs as soon

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[4]According to the United States Department of Labor, the current recession began in the second quarter of 1981. Exhibit A, *infra*, at page 27.

[5]The only exception was the 1961-69 recovery period. In the preceding recession (1960-61) minorities left the work force at a rate of 1.88 times faster than whites. When the economy recovered, they returned to the work force 2.23 times faster than whites.

as the economy begins to recover. Rather, it must be recognized that minorities laid off during a recession will remain unemployed far longer than whites laid off at the same time.

Measured against these factors, the interests of white protective service employees in enforcement of their seniority rights do not support the relief they seek. A program of layoffs based upon strict seniority would benefit white police officers and firefighters *only* because it would fulfill their expectations, expectations based upon the discriminatory conditions which existed prior to 1974 and the continuing effect of those conditions. Under these circumstances, the argument that the District Court acted improperly when it refused to allow the City of Boston to make the proposed layoffs according to strict reverse seniority is clearly specious.

CONCLUSION

For the foregoing reasons, amici respectfully submit that this appeal must be dismissed or, alternatively, that the decisions of the lower courts must be affirmed.

Respectfully submitted,

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EXHIBIT A

MINORITY-NONMINORITY JOBLESS RATES AND INCREMENTAL RATIO OF MINORITY-NONMINORITY UNEMPLOYMENT DURING RECESSIONS AND RECOVERIES—1957-1982

	Beginning Unemployment		Ending Unemployment		Absolute Percentage Point Change		Incremental* Ratio
	Min.	NonMin.	Min.	NonMin.	Min.	NonMin.	
Recessions							
1957 I—1958 II	7.4%	3.6%	13.4%	6.6%	6.0%	3.0%	2.00
1960 II—1961 II	9.9	4.7	12.9	6.3	3.0	1.6	1.88
1969 IV—1975 II	6.2	3.3	10.1	5.5	3.9	2.2	1.77
1973 IV—1975 II	8.6	4.3	14.2	8.2	5.6	3.9	1.44
1980 I—1989 IV	11.8	5.5	13.9	6.7	2.1	1.2	1.75
1981 II—1982 II	14.6	6.2	18.5	8.4	3.9	2.2	1.77
Recoveries							
1958 II—1960 II	13.4	6.6	9.9	4.7	3.5	1.9	1.84
1961 II—1969 IV	12.9	6.3	6.2	3.3	6.7	3.0	2.23
1971 IV—1973 IV	10.1	5.5	8.6	4.3	1.5	1.2	1.25
1975 II—1980 I	14.2	8.2	11.8	5.5	2.4	2.7	.89
1980 III—1981 II	13.9	6.7	14.6	6.2	−.7	.5	−1.40**

Sources: 1957-81 statistics obtained from United States Department of Labor, *Employment and Training Report of the President* (1982). 1982 statistics obtained from United States Department of Labor, *Employment and Earnings* (1982).

*Incremental ratio equals the absolute percentage point change for minorities divided by the absolute percentage point change for nonminorities. Result is the rate at which minorities leave/enter the workforce as compared to the rate for nonminorities.

**Since the unemployment rates of the two groups moved in opposite directions during this period, this incremental ratio means that minorities entered unemployment at 1.4 times the rate nonminorities left unemployment.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Intervenor-Petitioner,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Intervenor-Petitioner,

VS.

PEDRO CASTRO, et al.,
Respondents.

NANCY BEECHER, et al.,
Petitioners,

VS.

BOSTON CHAPTER, NAACP, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of petitioners, Boston Firefighters Union, Local 718, *et al.* Consent to the filing of

this brief has been granted by intervenor-petitioner, Boston Police Patrolmen's Association, Inc., intervenor-petitioner, Boston Firefighters Union, Local 718, and petitioners, Nancy B. Beecher, *et al.* Respondents, Boston Chapter, NAACP, *et al.*, have withheld consent. The consents have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal Foundation's members, contributors, and supporters have expressed concern regarding affirmative action programs which result in harm to innocent persons, one of the issues in this case. In order to voice these interests, the Board of Trustees of Pacific Legal Foundation, the majority of whom are attorneys, has authorized the filing of this brief.

Because the interests of petitioners center mainly upon protection of seniority rights and questions of federalism, Pacific Legal Foundation believes that the equal protection issues presented by this litigation could receive inadequate attention from the parties. Whether equal protection of the laws extends to all persons without regard to race or ethnicity is an issue which deserves briefing from as many viewpoints as possible. This is an area of the law which is unsettled at present. Pacific Legal Foundation believes that its position has broad public support, and that its public policy perspective will allow it to provide the Court with a more thorough briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed amicus briefs in *Regents of the University of California v. Bakke; United Steelworkers of America v. Weber*; and *Fullilove v. Klutznick.*

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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December, 1982

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, BOSTON FIREFIGHTERS UNION, LOCAL 718, et al.

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982).

STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, adopts the statement of the case set forth by petitioners.

SUMMARY OF THE ARGUMENT

The orders issued by the District Court discriminate against certain police officers and firefighters on the basis of race without compelling justification and are thus invalid under the Equal Protection Clause. The plan protects the jobs of minority officers never discriminated against and results in the discharge of white officers hired *after* the affirmative action hiring plan was in effect. The orders thus fail to tailor the remedy to the scope of the prior unintentional hiring discrimination. The orders unnecessarily trammel the interests of nonminority individuals in a manner unprecedented in any court-approved affirmative action plan. The courts below justified their decisions by pointing out the broad, equitable powers possessed by a federal court. The *effect* of the orders, superseding a valid state statute never challenged and violating the constitutional rights of innocent officers, was totally ignored. The decision of the Court of Appeals should therefore be reversed.

ARGUMENT

I

USING RACE AS A CONSIDERATION IN DETERMINING THE ORDER OF LAYOFFS VIOLATES THE EQUAL PROTECTION CLAUSE

The United States District Court for the Eastern District of Massachusetts granted a motion which prohibits reduction in the percentage of blacks and Hispanics in city police and fire departments below levels existing at the

commencement of layoffs due to budget restrictions. The order modified a prior consent decree which implemented an affirmative action hiring program but did not address layoffs. To accomplish its purpose, the District Court ordered that the police and fire departments establish separate seniority lists for minority officers and nonminority officers and maintain the percentages of minorities even though this meant nonminority officers with greater seniority were laid off before minority officers with less seniority.

The orders of the District Court discriminate against identifiable officers on the basis of race and are thus invalid. Oral argument in the Court of Appeals revealed that of 258 police officers laid off under the order, 224 were white, but that the seniority system operating in a color-blind fashion would have resulted in only 126 white officers being laid off. *Boston Chapter, NAACP*, 679 F.2d at 976-77 n.14. The figures also revealed that white officers with over eight years seniority were laid off before minority counterparts with less than two years on the force. *Id.* The record clearly demonstrates discrimination on the basis of race.

The crucial inquiry is whether that discrimination can pass muster under the Equal Protection Clause. The proper test is one of strict scrutiny: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (citations omitted). This standard demands an inquiry into whether there exists a compelling interest in discriminating against these few, identifiable white officers. *See Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972). The Court of Appeals found a compelling interest in "[t]he

fact of past discrimination[1] agreed to in both cases." *Boston Chapter, NAACP,* 679 F.2d at 977. The court tried to avoid the "two wrongs do not make a right" argument by stating that "whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics." *Id.* This rationale fails because the layoffs largely affect only employees hired since the affirmative action program commenced. Thus the whites who reaped past benefits were not laid off, and blacks and Hispanics allegedly victimized by prior hiring practices were not protected by the orders. The vast majority of individuals in both groups had sufficient seniority to protect their jobs whether the order issued or not. Oddly enough, hearings were never conducted to determine who was, and who was not, discriminated against. Therefore, the District Court should have refused to grant the modification because it impermissibly extended the scope of the remedial orders beyond "the nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 744 (1974). There is no compelling justification for protecting persons who have not been discriminated against from the operation of a bona fide seniority system, to the detriment of other individuals who have done no wrong other than to be born with a certain skin color. The "group" analysis of the Court of Appeals cannot stand up to the equal protection guarantees which our laws

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[1]Only discriminatory impact was alleged. If violations of the Equal Protection Clause are alleged, *purpose* to discriminate must now be shown. *Washington v. Davis,* 426 U.S. 229, 245 (1976). The majority rule is that 42 U.S.C. § 1981 claims must also prove intentional discrimination. *Croker v. Boeing Company (Vertol Division),* 662 F.2d 975, 984-85 (3d Cir. 1981).

afford every citizen *individually*.[2] "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

The ordered modification cannot stand because it "unnecessarily trammels" the rights of the nonminority workers. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court approved a private, voluntary affirmative action plan which did not result in the discharge of white workers.[3] In *Fullilove v. Klutznick*, Chief Justice Burger noted that burdens on innocent parties from the affirmative action plan were "relatively light." 448 U.S. 448, 484 (1980). Similarly, Justice Powell found these burdens on white workers to be "not sufficiently significant." *Id.* at 515 (Powell, J., concurring). In the instant case, on the other hand, a federal court has granted a modification which takes away vested seniority rights from innocent persons, resulting in the loss of their jobs. There exists no rational basis, and certainly no compelling justification, for such a "remedy."

The separate seniority lists ordered by the District Court are strangely reminiscent of the separate but equal plan set forth in *Plessy v. Ferguson*, 163 U.S. 537 (1896). This type of "equality" has been consistently disapproved by

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[2] "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

[3] "At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees." *United Steelworkers of America*, 443 U.S. at 208.

the Court because, as it noted in *Shelley v. Kraemer*, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22. There is no compelling interest for the separate classification approved by the lower courts because the record clearly establishes that "there is no evidence that defendants [Massachusetts Civil Service Commission] ever expressed a discriminatory purpose or used any practice which on its face was invidiously discriminatory." *Castro v. Beecher*, 334 F. Supp. 930, 935 (E.D. Mass. 1971) (the police case). Thus, not only have respondents failed to show that the orders will aid specific victims of past discrimination, they are arguing for racial classifications based upon factual findings which have no legal significance under *Washington v. Davis*, 426 U.S. 229, 244-45 (1976). There this Court discredited the view "that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." *Id.* at 245. The Court noted that several federal courts of appeal had, in several contexts including public employment, erroneously held proof of disproportionate impact sufficient to prove discrimination. The Court expressly cited *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972), as one such wrongly decided case. *Washington v. Davis*, 426 U.S. at 244 & n.12. In the next term, the Court reaffirmed this part of *Washington v. Davis*, noting that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

The Court of Appeals in the present case, however, ignored the relevance of these cases, finding that "the pattern of relief which the present modifications . . . seek

to preserve was conclusively established prior to those decisions." *Boston Chapter, NAACP*, 679 F.2d at 971. This argument proves too much. It is precisely that "pattern of relief" that is based upon erroneous conclusions of law. Thus, for the court below to hide behind its right to modify a previous order,[4] while ignoring the obvious fallacies contained therein, is simply an abuse of its equitable powers.

The time is ripe to clear the muddied waters surrounding the Equal Protection Clause.[5] The remaining vestiges of racial discrimination will never disappear until the courts command an interpretation and observance of the law that is color-blind. Justice Douglas observed that "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting). With all respect, this Court has been less than decisive in interpreting the mandate of the Constitution.[6] The lack of clear guidance has given lower courts

[4]It is questionable whether the District Court could even "seek to preserve" the percentages of minorities on the forces. The Supreme Court has held that a federal court in this context was correct in only *implementing* the remedial devices and not overseeing them. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976).

[5]*See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); United *Steelworkers of America v. Weber*, 443 U.S. 193 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). These three decisions resulted in fifteen opinions; at least one by each of the nine justices.

[6]"In ten years of wandering about this political thicket, we have not yet found the burning bush of final explanation." *Graves v. Barnes*, 343 F. Supp. 704, 708 (W.D. Tex. 1972), *aff'd sub nom. Archer v. Smith*, 409 U.S. 808 (1972), *modified sub nom. White v. Regester*, 412 U.S. 755 (1973), *vacated as moot*, 422 U.S. 935 (1973).

unbridled discretion to become involved in politics and judicial activism at the expense of innocent citizens. The line must be drawn when those citizens are forced by court order to relinquish their jobs.

II

A VALID STATE SENIORITY STATUTE MAY NOT BE SUPERSEDED BY A FEDERAL COURT MERELY TO GRANT INCREASED SENIORITY TO SOME TO THE DETRIMENT OF OTHERS

By requiring that separate seniority lists be maintained for whites and minority officers, the District Court effectively preempted operation of a valid state statute, MASS. GEN. LAWS ANN. ch. 31, § 39 (West 1978). In the section of its opinion attempting to justify this normally unconstitutional conduct (*Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)), the Court of Appeals began by noting that "[t]here are three Supreme Court cases that focus on the problem of seniority rights and discrimination against minorities." *Boston Chapter, NAACP*, 679 F.2d at 973. In discussing the first of these (*Franks v. Bowman Transportation Company*, 424 U.S. 747, 779 (1976)), the Court of Appeals acknowledged that the decision granted relief to "'*identifiable* victims of illegal hiring discrimination.'" *Boston Chapter, NAACP*, 679 F.2d at 974 (emphasis added) (*quoting Franks v. Bowman Transportation Company*, 424 U.S. 747, 779 (1976)). The *Franks* decision stated that "[c]ertainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract." *Id.* at 778. In the present case, the court order

does in fact deprive other employees of vested seniority rights. In *Franks*, the remedy was an award of seniority status to the identifiable victims who would have been hired *but for* the discrimination, by making seniority retroactive to the dates of the plaintiffs' employment applications. The District Court in the instant case, on the other hand, never even attempted to determine who had suffered because of the prior discrimination, choosing instead to abuse its equitable powers by modifying the existing seniority system. The Massachusetts statute was never challenged by any party in the case and yet the District Court felt compelled to intrude into the legislative arena of a state and suspend the operation of a valid state statute.

Next the Court of Appeals cited *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). That decision granted relief to minority group members *who had applied previously* for a line-driver position. Nonapplicants had to carry a heavy burden of showing individually that they would have applied "but for [their] knowledge of the company's discriminatory policy." *Id.* at 371. The Supreme Court also called for a balancing of the remedial interests of identifiable victims of discrimination against "legitimate expectations of other employees innocent of any wrongdoing." *Id.* at 372. This was deemed a "delicate task" by the Court. Apparently, the Court of Appeals in the present case did not undertake this task, delicately or otherwise.[7]

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[7] "[I]n the exercise of its equity powers, the Court cannot ignore the effect any change might have on the party opposing the [modification] motion." *Coalition of Black Leadership v. Cianci*, 480 F. Supp. 1340, 1342 (D.R.I. 1979).

The Court of Appeals also discussed the most recent decision, *American Tobacco Company v. Patterson*, 102 S. Ct. 1534 (1982). That decision granted bona fide seniority systems broad protections from attack on grounds of unintentional discrimination. It held that perpetuation of independent discriminatory employment practices by application of a bona fide seniority system does not form a sufficient basis for invalidation of the system. *Id.* at 1541. *Accord, Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1784 (1982).

The Court of Appeals ignored the real issues in this case, choosing instead to view it as one in which it exercised its power to preserve relief achieved pursuant to previous orders. It follows logically that a federal court could, for example, maintain indefinitely "'separate but equal'" orders granted before 1954 even after *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), was decided. This ignores the operation of stare decisis in our system of justice. Respondents fully realize that *Washington v. Davis* will not allow the relief they seek if they bring a new suit.[8] The results should be no different in a modification proceeding.

CONCLUSION

The "make-whole" remedy envisioned by the *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), and *Franks v. Bowman Transportation Company* decisions was designed to assist only the actual victims of discrimination. Those persons not subjected to past acts of discrimination should not benefit from overboard relief at the expense of

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[8] *See, supra* note 1.

a few, innocent workers. No one can refute that certain minorities have been discriminated against in the past. As a society we have come a long way, and we must be vigilant in enforcing the laws which provide remedies for civil rights violations. Our legislators have made certain that anyone who is discriminated against on the basis of race now has a remedy for this violation of his or her rights. Disadvantaged individuals may be given a temporary advantage in order to restore the status quo but for the discrimination, but such an advantage for some may not work to discriminate against others *on the basis of race* as occurred in the present case. Our national commitment to equal rights under the law does not command it; our Constitution will not allow it.

Respectfully submitted,

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No. 82-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
v.
BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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December 16, 1982

QUESTION PRESENTED

Whether a federal court can replace a racially neutral, bona fide seniority system with a court order that mandates preferential treatment for minority workers based solely on their race even though they are not victims of discrimination?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

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---

MOTION OF THE WASHINGTON LEGAL FOUNDATION TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves pursuant to Supreme Court Rule 42 to file the annexed brief *amicus curiae* in the above-captioned proceeding. Petitioner consents to the filing of the brief. Respondents failed to respond to WLF's request for consent.

The Washington Legal Foundation is a national non-profit public interest law center that engages in litiga-

tion and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases relating to government regulations and constitutional law which involve the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by this Court in employment discrimination cases such as *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L. Ed.2d 835 (1982); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to reverse the decision of the First Circuit Court of Appeals in *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). The First Circuit's ruling suspends the application of a bona fide seniority system established by State law and immunized from attack by § 703(h) of the Civil Rights Act of 1964. The Court mandates preferential treatment for certain workers, based solely on their race, even though they have not been identified as victims of past discriminatory practices. In doing so, the lower court effectively dons a legislative mantle by substituting its judgment for that of Congress and the State legislature; an act which is neither judicial in function nor in accord with the prior decisions of this Court or other U.S. Courts of Appeals. Hence, WLF is seeking to protect the broader interests in this case—the right of *any* individual, black, white or otherwise, to be free from discrimination based on race.

The Washington Legal Foundation can bring to this case a broader perspective not presently represented which may assist this Court in obtaining full consideration of the public interest issues. WLF believes that resolution of the case at bar will have an impact which far exceeds its case-unique aspects. The instant decision will ultimately affect the seniority rights of millions of American workers and the relationships of those workers with labor unions, employers, and the Federal Government. Fundamental concepts of equality mandated by statute and the Constitution are at stake here.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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December 16, 1982

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The interest of the Washington Legal Foundation in this case is set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

The Washington Legal Foundation adopts the recitation of facts in the Petition for Writ of Certiorari at pages 3-8 in the interests of judicial economy. However, the facts which are particularly material to the issues at bar are summarized in order to frame *amicus'* presentation.

The decision of the United States Court of Appeals for the First Circuit upholds a District Court order which modified a 1974 consent decree in an employment discrimination case against the fire and police departments of Boston and other Massachusetts towns. The suit, filed under 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964, focused on hiring practices and the 1974 decree ordered remedial action designed to increase the percentage of minorities in the fire and police departments.

The Boston Fire and Police Departments established priority certification groups which gave top priority to hiring any minority identified as a victim of past discrimination. By 1977, all victims of past discrimination who sought employment had been hired. However, a 1981 fiscal crisis engendered by a tax reduction referendum necessitated a systematic program of layoffs in the fire department. Firefighters and policemen were to be laid off pursuant to the "last-hired, first-fired" provisions of Massachusetts law. Mass. Gen. Laws, Ch. 31, § 339.

The District Court, however, found that the application of the seniority system would dilute the percentage of minorities employed by the Boston Fire and Police departments. Hence, the court issued an injunction prohibiting layoffs by reverse order of seniority. (No minority firefighter who was an identified victim of past discrimination would have been laid off under the last hired, first fired system). In short, the Court below mandated that layoffs be implemented according to a wooden formula imposing racial quotas on the process.[1]

The First Circuit approached the case as one involving "two competing rights, earned seniority versus . . . racially balanced police and fire departments," *Beecher*, 679 F.2d

[1] Subsequent to the court order, the Massachusetts legislature provided funds for rehiring laid-off firefighters. The lower court again mandated that the application of the seniority system be suspended for purposes of the recall.

at 977, and upheld the suspension of the seniority provisions of the Massachusetts Civil Service Statute. In the Fire Department alone, over 100 non-minority firefighters who would otherwise have retained their jobs were discharged as a result of the lower court's ruling.

SUMMARY OF ARGUMENT

The First Circuit Court of Appeals erroneously ruled that a federal court can suppress the operation of a racially neutral, bona fide seniority system on the grounds that it has a disproportionate impact on minorities. The court's attempt to characterize its decision as involving only the power of a court to modify an existing equitable remedy fails. Semantics cannot disguise that the court has engaged in unauthorized social engineering by superimposing a racial quota on the layoffs of otherwise equal minority and non-minority workers without even demonstrating that the minority workers were victims of discriminatory practices. Since its ruling is at odds with the language and legislative history of sections 703(h) and (j) of the Civil Rights Act of 1964 and the prior decisions of this Court and other U.S. Courts of Appeals, its decision must be reversed.

The ruling below must also be reversed because it sanctions or authorizes reverse discrimination in violation of the Equal Protection Clause of the U.S. Constitution. The First Circuit mandates a system of racial preference for minority groups at the expense of other innocent individuals absent any findings that the groups preferred suffered anything more than general societal discrimination. Hence, the lower court's decision is not the limited and properly tailored remedy necessary to cure the effects of prior discrimination which this Court requires in order for a racial preference classification to pass constitutional muster.

Moreover, the decision below is contrary to the public interest. By replacing individual rights and opportunities with a system of statistical racial quotas, the lower

court engages in social engineering and violates basic concepts of our democratic society, unnecessarily trammels the interests of nonminority employees, and undermines national labor policy. Hence, both legal and policy reasons support reversing the decision of the First Circuit Court of Appeals.

ARGUMENT

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS CONTRARY TO THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTIONS 703(h) AND (j) OF THE CIVIL RIGHTS ACT OF 1964 AND THE PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The decision of the First Circuit Court of Appeals fails to recognize the special protection Congress afforded bona fide seniority systems in section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), or the prohibition against preferential treatment in order to achieve racial balance it provided in section 703(j). 42 U.S.C. § 2000e-2(j). Its conclusion that the operation of the last hired, first fired provisions of a valid seniority system established by State law must give way to a quota which specifies the percentage of minority employees who must remain on the job is at odds with the plain language and legislative history of sections 703(h) and (j) and the prior decisions of this Court and other U.S. Courts of Appeals. Therefore, the decision of the court below must be reversed.

A. The Plain Language and Legislative History of Section 703(h) of the Civil Rights Act Indicate a Congressional Intent, Recognized by This and Other Courts to Immunize Bona Fide Seniority Systems From Attack Under the Civil Rights Laws.

The plain language and legislative history of section 703(h) of the Civil Rights Act of 1964 demonstrate that Congress intended to foreclose attacks under the civil rights laws on bona fide seniority systems. Section 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(h). Thus, the language of section 703(h) indicates that the operation of a seniority system is not subject to attack unless it is motivated by an intent to discriminate. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

An examination of the legislative history of section 703(h) buttresses the conclusion that seniority systems are exempt from challenges under the civil rights laws. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *American Tobacco Co. v. Patterson*, 50 U.S.L.W. 4364 (April 15, 1982); *Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Workers of International Harvester*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *see generally*, Vaas, *Title VII: Legislative History* 7 B.C. Ind. & Com. L. Rev. 431, 445 (1966). It is clear from that history that Congress specifically addressed Title VII's effect on seniority systems and struck a balance between the application of Title VII and the operation of racially neutral seniority systems which is now undermined by the decision of the First Circuit.

Charges were leveled during the adoption of Title VII that it would destroy existing seniority rights. *See International Brotherhood of Teamsters v. United States*, 431

U.S. 324, 350, n.33 (1977). As part of the effort to clarify the intent and effect of the bill (an effort necessary to insure its passage), an Interpretive Memorandum by Senators Clark and Case, floor managers in the Senate for Title VII, was placed in the Congressional Record. It stated that:

> *Title VII would have no effect on established seniority rights* . . . for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 *Cong. Rec.* 7213 (April 8, 1964) (emphasis added); *see also* 110 *Cong. Rec.* 7217 (April 8, 1964) (remarks of Senator Clark). Similarly, a Department of Justice memorandum interpreted Title VII as not affecting seniority systems:

> *Title VII would have no effect on seniority rights* . . . If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first . . . *assuming that seniority were built up over a period of time these rights would not be set aside by the taking effect of Title VII.* Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 *Cong. Rec.* 7207 (April 8, 1964) (emphasis added). These statements, which this Court has termed "authoritative," *Teamsters*, *supra* at 352, are representative of other statements defining the purpose of Congress in enacting section 703(h). See *id.* at 350-52; *American Tobacco Co.*, *supra* at 4366-67. *See generally* Capaldi,

Twisting the Law, 12 POLICY REVIEW 39 (1980). Given this clear expression of Congressional intent, it is not surprising that this Court and most of the U.S. Courts of Appeals which have considered the question have upheld the Congressional mandate to not interfere with the operation of seniority systems.

1. ***This Court has recognized that bona fide seniority systems such as the one at bar are not subject to judicial interference absent a discriminatory purpose.***

This Court has consistently recognized that "the unmistakable purpose of section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters*, 431 U.S. 324, 352 (1977). *See also, United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *American Tobacco Co. v. Patterson*, 50 U.S.L.W. 4364 (April 6, 1982); *Pullman-Standard, A Division of Pullman, Inc. v. Swint*, 50 U.S.L.W. 4425 (April 27, 1982). The Court has given effect to this purpose in a variety of contexts which are similar in principle to the one at bar.

For example, in *Teamsters, supra*, an employer maintained parallel seniority systems for different job classifications under the terms of a collective bargaining agreement. Transfer by an employee from one job to another resulted in a forfeiture of seniority for the new position. While this Court found that the seniority system distributed benefits in a manner that had a disproportionate impact on minorities, it concluded nevertheless that "both the literal terms of section 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them even when an employer had initially discriminated in hiring." 421 U.S. at 350.

Accordingly, a seniority system violates Title VII only if it is not "bona fide" or its impact results from an "intention to discriminate." *Id.*

The *Teamsters* Court concluded that the seniority system under attack there was "entirely bona fide." 431 U.S. at 355. The Court reasoned that it applied equally to all races and ethnic groups and did not have its genesis in racial discrimination. *Id.* Hence, judicial interference with the operation of the system was unwarranted.

This Court similarly concluded in other cases that the operation of a seniority system with some discriminatory consequences is not unlawful absent a discriminatory intent. *Pullman-Standard, supra,* involved a challenge to a seniority system which measured seniority by length of continuous service in a particular department; employees transferring to new departments forfeited their seniority. The District Court held a trial to determine whether the system was adopted for racially discriminatory purposes and concluded that it was not. The Fifth Circuit Court of Appeals reversed the trial court's determination. In ruling that the Court of Appeals erred in reviewing the District Court's judgment, this Court held that under section 703(h) "a showing of disparate impact is insufficient to invalidate a seniority system even though the result may be to perpetuate pre-Act discrimination." 50 U.S.L.W. at 4426. *See also Trans World Airlines,* 432 U.S. at 82 ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); *American Tobacco Co.,* 50 U.S.L.W. at 4365 ("the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved.")

Significantly, no allegations or findings of an intent to discriminate have been made in the case at bar. Nor have any victims of past discriminatory practices been identi-

fied who have been denied their rightful seniority.[2] *Cf. Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

While the First Circuit attempts to veil its action in a semantic sleight-of-hand by stating that "the basic issue at stake here [is] the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs," *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974 (1st Cir. 1982), *amicus* is at a loss to understand how the action of the courts below can be distinguished from the situations specifically identified by Congress as protected by section 703(h). Nor can WLF understand how the lower courts' action can be insulated from this Court's rulings that disproportionate impact alone is not sufficient reason to undermine a seniority system. It is abundantly clear that this case involves only the validity of the seniority system mandated by the Massachusetts Civil Service Statute under Title VII and a federal court's attempt to eviscerate it and the intent of Congress embodied in section 703(h). Both the District Court and Court of Appeals ignored the *bona fides* of the seniority system under attack. Instead, they focused solely upon the disparate impact of the projected layoffs on minority employees and proceeded to substitute their personal notion of the social good for the "careful balance" Congress struck when it passed section 703(h). *American Tobacco Co., supra* at 4368. That their judgment is contrary to the language and legislative history of section 703(h) and the principles previously anounced by this Court is sufficient reason to reverse. A brief examination of other pertinent authority adds further support for a reversal.

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[2] Indeed, it could not involve identifiable victims of past discrimination since none of the minorities who were laid off or who would have been laid off except for the District Court order were victims of the fire department's prior discriminatory *hiring* practices.

2. *Decisions of other U.S. Courts of Appeals, which recognize the difference between remedial and preferential treatment, also support a reversal of the First Circuit's ruling.*

The decisions of other U.S. Courts of Appeals, which are indistinguishable in fact and principle from the case at bar, support a reversal of the ruling below. *See Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co. v. Local Union 327, I.B.E.W.*, 508 F.2d 687 (3rd Cir. 1975) *cert. denied*, 425 U.S. 998 (1976); *Watkins v. Steel Workers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975); *Chance v. Board of Examiners and Board of Education of the City of New York*, 534 F.2d 993 (1976) *cert. denied*, 431 U.S. 965 (1977). *Contra, Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). For instance, *Watkins, supra*, considered whether the use of employment seniority to determine the order of layoff and recall of employees violated either Title VII or 42 U.S.C. § 1981 given that the employer discriminated in hiring at an earlier time. Like the seniority system mandated by Massachusetts law, the system in *Watkins* measured seniority by total time of employment. The Fifth Circuit held that:

> regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory . . . an employer's use of a long established seniority system for determining who will be laid off, and who will be rehired, adopted without intent to discriminate is not a violation of Title VII or § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.

516 F.2d at 44-45.

The process by which the Fifth Circuit reached its conclusion is instructive here. The Court noted that "[t]here is no contention . . . that the seniority system under attack was the result of an intention to discriminate." *Watkins*, 516 F.2d at 47. Moreover, an examination of the facts indicated that none of the plaintiffs had been subjected to "individual discrimination at the hands of the Company." *Id.* at 46. According to the court, "[a]ge, not race is the principal reason the plaintiffs . . . did not have sufficient seniority to withstand layoff. All but one were under the age of legal employment when the Company commenced equal hiring." *Id.* In light of these circumstances, the Fifth Circuit made a critical legal distinction between remedial and preferential treatment which eluded the First Circuit:

> *To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . The result which plaintiffs seek, therefore is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703 (j).* 42 U.S.C. § 2000e-2(j).

Id. (emphasis added).

The Second Circuit reached the identical conclusion in *Chance, supra.* As in *Watkins* and the instant case, the *Chance* court examined the operation of a facially neutral last hired, first fired provision of a seniority system which had a disproportionate impact on minorities. The District Court there, like the District Court and First Circuit here, fashioned "relief" which was designed to "insure that there would continue to be a specified quota of [minorities] employed" in the work force. 534 F.2d at 998. Nevertheless, the Second Circuit reversed the trial court's decision since the "relief" was not directed to victims of discrimination. *See also Jersey Central, supra.*; *Waters, supra.*

The sound reasoning of the Fifth, Second, Third, and Seventh Circuits underscores the errors in the First Circuit's analysis. There was, for instance, no contention or proof below that any minority firefighter who would have been laid off absent judicial intervention was the subject of individual discrimination by the Fire Department. In fact, the record indicates that the minority firefighters hired from 1978 through 1980 enjoyed the benefit of the Department's equal hiring practices and that *none* of the victims of prior discrimination would have been laid off. Thus, the layoffs, which should have been implemented on the basis of length of employment, proceeded instead solely on the basis of a color conscious quota; that is, the rulings below granted individual employees superseniority without any remedial purpose. There was no discrimination to be remedied as to the individuals favored in the court order and it seems obvious that a wrong which did not occur cannot be remedied.

The sole stated goal of the action below was to insure a certain percentage of minority firefighters; a goal which has nothing to do with insuring that the seniority system operates in a non-discriminatory manner. Achieving that goal clearly violates the purpose of section 703(h) and, as demonstrated below, the proscription of section 703(j) as well.

B. The First Circuit's Ruling Also Violates Section 703(j)'s Proscription Against Preferential Treatment to Correct Racial Imbalance in a Work Force.

The First Circuit's Ruling is inconsistent with the language, legislative history, and prior judicial interpretations of section 703(j) of Title VII. Section 703(j) flatly states that the Civil Rights Act shall not:

> be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of per-

> sons of any race employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community. . . .

42 U.S.C. § 2000e-2(j). Thus, the plain language of section 703(j) appears to prohibit the kind of quota mandated below.

The legislative history of the provision supports that conclusion. Like the legislative history of section 703(h), that of section 703(j) has been examined in depth elsewhere and will not be repeated in detail here. For example, in *United Steel Workers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980), the plurality and dissenting opinions all examined the legislative history of section 703(j) and recognized that the provision resulted from Congressional concern that Title VII "would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to racial minorities. . . ." *Id.* at 205. *See also id.* at 217 (Burger, C.J., dissenting); *id. at* 227-28 (Rehnquist, J., dissenting). As the Court's opinion stated:

> The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue 'Federal Government interference . . . because of some Federal employee's ideas about racial balance or racial imbalance.'

Id. at 206-07 (citations and footnote omitted).

In light of the language and legislative history of Title VII, this Court has ruled that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and that "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976). While this Court

has considered Title VII's outright prohibition against preference based on race, *see Weber*, *supra*, it has never interpreted it to *require* preference based on race absent identified victims of discrimination.

The decision below, no matter how the First Circuit attempts to characterize it, interprets Title VII as permitting a federal court to *require* preference based solely on race in order to achieve racial balance. The other Courts of Appeals which have considered the precise question now facing this Court have held that:

> All agree . . . that the nonremedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress.

Chance, 534 F.2d 998; *Watkins*, 516 F.2d at 46; *Jersey Central*, 508 F.2d at 709; *Waters*, 502 F.2d at 1319.

The First Circuit should have reached a similar conclusion in the case at bar. Instead, it chose to "rewrit[e] a crucial part of Title VII to reach a 'desirable' result," *Weber*, 443 U.S. at 219 (Burger, C.J., dissenting), and to act as "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." *Id.* at 219-20, *quoting*, Cardozo, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Unfortunately, the lower court's ideal abuses the clear language of and underlying motivation for a Congressional enactment. As one commentator has noted, "[i]n order to go beyond race-consciousness, Congress felt that such a public policy had to be eliminated outright, not perpetuated in a slightly different guise and directed toward different victims." Hatch, *The Son of Separate But Equal: The Supreme Court and Affirmative Action*, in A BLUEPRINT FOR JUDICIAL REFORM 63 (P. McGuigan & R. Rader, ed. 1982) (hereafter "Hatch"). Since the First Circuit's decision perpetuates race-consciousness with new victims in violation of section 703(j), the ruling below must be reversed.

II. REQUIRING SENIOR EMPLOYEES TO STAND ASIDE AND FOREGO THEIR SENIORITY BENEFITS GUARANTEED BY LAW, SOLELY BECAUSE AN OTHERWISE EQUAL, LESS SENIOR EMPLOYEE IS BLACK OR HISPANIC, VIOLATES THE CONSTITUTION.

The decision of the First Circuit Court of Appeals, which requires senior firefighters to relinquish seniority benefits guaranteed them by law solely because otherwise equal, less senior employees are black or hispanic, violates the Equal Protection Clause of the United States Constitution. The lower court's opinion admits that:

> This case does not involve an award of constructive seniority to individuals who had been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination.

Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. After cursory references to this Court's decisions in *Mc Donald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), *University of California Regents v. Bakke*, 438 U.S. 265 (1978), *United Steelworkers of America v. Weber*, 443 U.S. 193, *reh'g denied*, 444 U.S. 889 (1980), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the First Circuit notes that none of these cases "involve public employment nor address directly . . . the conflict between a last hired, first fired seniority system and court orders seeking to maintain same semblance of racial balance. . . ." 679 F.2d at 976. The court blithely reasons that "[w]e do not think the issue can be resolved by simply following the Title VII cases and awarding constructive seniority to those minority members . . . that can show that they were discriminated against . . ." Rather, the court reasons that while certain individual white workers innocent of discrimination will lose their jobs, "whites *as a*

group reaped significant advantages in the past in hiring and promotions. . . . This is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments" which "the public interest requires." *Id.* at 977. Thus, the court concludes that "[w]hile the orders place a relatively greater share of the burdens of the layoffs upon non-minorities, this does not constitute 'reverse discrimination.'" *Id.* at 978.

The Washington Legal Foundation submits that the First Circuit's reasoning indeed constitutes reverse discrimination in violation of the principles previously announced by this Court. Justice Powell stated in *Bakke*, *supra*, that "[r]acial and ethnic distinctions of *any sort* are inherently suspect and thus call for the most exacting judicial examination." 438 U.S. at 291 (emphasis added). In conducting such examinations, this Court has refused to justify allegedly remedial action solely on generalized societal discrimination. As the *Bakke* court stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent individuals* in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

438 U.S. at 307 (emphasis added). This finding of discrimination must be much more focused than a general finding of overall " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Id.*

Bakke, and later *Fullilove*, *supra*, thus establish a fundamental prerequisite to the imposition of a racial preference classification—a finding of actual prior discrimination. Moreover, the preference must be "a limited and properly tailored remedy to cure the effects of prior

discrimination" to pass Constitutional muster. *Fullilove*, 448 U.S. at 484. The *Fullilove* Court emphasized that the program approved there was very narrowly tailored so that only those minority businesses who had actually suffered from past discrimination would benefit from the quota imposed. In contrast, the quota imposed in the instant case is neither "limited," "properly tailored," based on findings of "prior discrimination," nor a "remedy." It is merely a reflection of what two lower federal courts personally believe will best serve their notions of the public interest. Even if their judgment was correct, they lack the authority to make such a decision. As the decisions stands, the quota imposed constitutes reverse discrimination in violation of the Equal Protection Clause.

III. THE LOWER COURT'S DECISION IS CONTRARY TO THE PUBLIC INTEREST.

Substantial policy reasons exist for striking down the First Circuit's decision in the case at bar. An objective examination of the court's opinion demonstrates that it has assiduously avoided the controlling principles of law in order to reach a decision which comports with its view of the social good. The court's attempt at social engineering constitutes a legislative decision which far exceeds its authority and expertise. The decision is nothing more than unwarranted judicial interference of the type which has undermined public confidence in the federal judiciary.

While the First Circuit's decision may be well-intended, it disserves the public interest. Its replacement of individual rights and opportunities with a system of group rights and statistical racial quotas is repugnant to the basic concepts of our democratic society. It destroys individual freedom and denigrates individuals by reducing them to and granting them preference on a single charac-

teristic of birth—skin color. Ironically, a majority of Americans, minority and non-minority, oppose the type of preferential treatment based on race mandated by the court below. *See, e.g.*, Sackett, *Ignoring the People*, 12 POLICY REVIEW 9, 17 (1980), *citing, Survey by the Gallup Organization*, Oct. 21-24, 1977. The reason, *amicus* submits, for public opposition is:

> that Affirmative Action has nothing to do with the transcendant cause of civil rights. Affirmative Action is not the logical and inevitable result of the civil rights efforts of the past three decades. It is exactly and precisely the contrary. It is a radical departure from the spirit and genius of the American Constitution (and I would be the first to admit that we have not always been faithful to that spirit and genius) because it denies that all are entitled to equal protection of the laws. Instead, *it says that what you get depends upon who you are, what your skin color or ethnic background is. It is a retreat to the medieval notion of government by status.*
>
> Affirmative Action is immoral (and is unconstitutional) for exactly the same reasons that discrimination is immoral (and is unconstitutional). It means that we are not treating people as individuals. It cannot be justified or regarded as some form of "reparation" for the wrongs of the past. The people who benefit from Affirmative Action are not the ones wronged and the people who must pay . . . are not the ones who committed the wrong.

Hatch, *supra* at 75 (emphasis added).

That the lower court mandates preferential treatment for minorities who were not victimized by discrimination is particularly egregious. It effectively creates superseniority for new employees; a "remedy" for a nonexistent wrong which "unnecessarily tramel[s] the interests of white employees," *Weber*, 443 U.S. at 208, in

an effort to redress past discrimination in its broadest and vaguest sense. Unfortunately, the effort is totally lacking in focus. The actual victims of past discrimination are not helped. At the same time, new, innocent victims suffer in order to grant preference to individuals who have not been wronged. The result, therefore, is not an equitable remedy, but discrimination in its most primitive and senseless form.

Finally, the impact of the First Circuit's decision on labor relations will also disserve the public interest. The court's statement that "[w]hile seniority was the normal way to decide who must go first, there is nothing magical about seniority . . . " flies in the face of national labor policy. This court has repeatedly recognized the strategic importance of seniority systems. In *American Tobacco Co. v. Patterson, supra*, the Court stated that:

> Seniority provisions are of "overriding importance" in collective bargaining. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison, supra*, at 79. See also Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). The collective bargaining process "lies at the core of our national labor policy. . . ." *Trans World Airlines, Inc. v. Hardison, supra*, at 79.

50 U.S.L.W. at 4368. This Court's statements underscore that seniority systems, which promote job security and form an objective standard for promotions, layoffs and the like, should not be readily cast aside. The First Circuit's opinion, which suppresses a bona fide seniority system, will have a broad-ranging and immediate adverse impact on labor relations in this country if it is allowed to stand. Such a fundamental change in our labor policy is neither called for nor in our best interests.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that the ruling of the court below must be reversed.

Respectfully submitted,

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December 16, 1982

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

v.

BOSTON CHAPTER, NAACP, ET AL.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

v.

PEDRO CASTRO, ET AL.

NANCY B. BEECHER, ET AL., PETITIONERS

v.

BOSTON CHAPTER, NAACP, ET AL.

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nited

QUESTION PRESENTED

The brief for the United States will address the following question:

Whether the district court exceeded its equitable authority by suspending the application of the "last hired first fired" requirement in a bona fide statutory seniority system to layoffs in the Boston Police and Fire Departments in order to maintain the percentage of minority employees in both departments who had been hired in response to a court order requiring affirmative action as a remedy for the City's prior discriminatory hiring practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

v.

BOSTON CHAPTER, NAACP, ET AL.

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

v.

PEDRO CASTRO, ET AL.

No. 82-259

NANCY B. BEECHER, ET AL., PETITIONERS

v.

BOSTON CHAPTER, NAACP, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. The Attorney General is responsible for the enforcement of Title VII in cases such as this one where the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issue presented in this case, viz., the propriety of a court order requiring that layoffs of city employees be made not on the basis of a preexisting system of seniority, but rather on a modified seniority system designed to assure that recently hired minority employees be retained, will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.

STATEMENT

The judgment of the court of appeals was entered in two consolidated cases, one involving the Boston Police Department and the other the City's Fire Department. The cases are summarized separately below.

1. *The Police Department Case*

a. This action was originally filed in 1970 by respondent Castro and other unsuccessful black and Hispanic applicants for appointment as Boston police officers. Plaintiffs alleged that the recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented by the City of Boston were racially discriminatory in violation of the Fourteenth Amendment and 42 U.S.C. 1981 and 1983.[1] See *Castro* v. *Beecher*, 334 F. Supp. 930, 934-935 (D. Mass. 1971).

[1] Before applicants for police (and fire) jobs in the City of Boston and other government bodies in Massachusetts can be considered for employment, they must pass a test devised and administered by the State Civil Service Commission. Mass. Ann. Laws ch. 31, § 15 (Michie/Law. Co-op. 1973). After passing the test, applicants must also meet age and medical requirements before they can be hired for employment by the City of Boston and other municipalities.

Following a bench trial, the district court ruled that the 1968-1970 Massachusetts Civil Service Police Entrance Examinations were not job related and discriminated against all applicants who "did not share the prevailing white culture."[2] 334 F. Supp. at 943. Although the court expressly found (*id.* at 944) that defendants had no intent to discriminate against minorities, it held that use of the examinations violated the Fourteenth Amendment and Sections 1981 and 1983. The court enjoined the Commission from making further certifications based on the discriminatory examinations (334 F. Supp. at 952), but denied plaintiffs' request for an order requiring hiring priority for blacks and Hispanics (*id.* at 945, 949-950).

b. The court of appeals affirmed on the liability issues,[3] but remanded the case for the district court to enter a

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[2] The district court found that in 1970 blacks represented 16.3% of Boston's population, but only 3.6% of its police force. 334 F. Supp. at 935.

[3] Acknowledging that defendants had not acted with discriminatory intent (*Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972), the court of appeals concluded that employment discrimination cases brought under the Constitution are governed by the "disproportionate impact" standard announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), for Title VII of the Civil Rights Act of 1964 (459 F.2d at 733). Subsequent decisions by this Court, however, have held that discriminatory intent is a necessary element of an employment discrimination claim brought under the Constitution (see *Washington* v. *Davis*, 426 U.S. 229 (1976)) and Section 1981 (*General Building Contractors Association* v. *Pennsylvania*, No. 81-280 (June 29, 1982)).

The petition for a writ of certiorari in No. 82-259 contends (at 41-42) that the original findings of constitutional violations in these cases are, therefore, infirm and that it was improper for the district court to rely "on those discredited legal conclusions to justify the 'modification' of the court's previous orders." Although the Police Department case was adjudicated in the district court before Title VII became applicable to state and municipal government employers in 1972, the district court in the Fire Department case appears to have held that the defendants' recruitment and certification practices violated Title VII (see page 6, *infra*). Accordingly, at least with respect to the Fire Depart-

remedial order requiring that black and Hispanic applicants be placed in a "priority pool" and be certified by the Civil Service Commission "according to some ratio, perhaps one from the priority pool to every one, two or three from the second pool * * *." *Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972) (footnote omitted). On remand, the district court approved and entered a consent decree providing for the creation of four groups of applicants, with certain black and Hispanic applicants being given a competitive advantage,[4] and affirmative recruitment of black and Hispanic applicants. *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973).

In 1975, the parties, at the district court's urging (*Castro* v. *Beecher*, 386 F. Supp. 1281 (D. Mass. 1975)), entered into a substitute consent decree based on the decree entered in the Fire Department case (see page 6, *infra*). This decree required certification of police applicants in a manner designed to ensure the appointment by Boston and Springfield of one minority officer for each

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ment case, the district court was certainly entitled to proceed on the premise that the defendants had engaged in unlawful employment practices. With regard to the police case, petitioners should be estopped to challenge the liability judgment that was fully litigated between these same parties and finally adjudged against petitioners in 1972. At a minimum, they should have been required to seek in the district court in the first instance a modification of the prior order based on a change in the law. Certainly, it is too late to open the issue in this Court.

[4] Under the decree, minorities who had been rejected for employment as a result of the illegal tests and who passed the new valid tests were placed in an eligibility category known as group A. Persons who had actually passed the illegal tests were placed in group B. New minority applicants who passed the valid tests were placed in group C and other successful test takers were placed in group D. The decree provided that for each applicant in group B certified there had to be an applicant from group A, until it was exhausted. Then for each group B applicant certified, an applicant from group C would have to be certified until both B and C were exhausted. Only then could applicants from group D be certified. 365 F. Supp. at 661.

non-minority officer. The decree provided that the remedial measure would apply until the percentage of minority officers in the municipality's police force was commensurate with the percentage of minorities within the community, at which time further certifications would be made according to Massachusetts law (Pet. App. A5-A6).[5]

Pursuant to these decrees, between 1974 and 1980 the Police Department in Boston hired 492 police officers, of whom 213, or 43%, were minorities. The percentage of minorities in the Police Department increased from 2.3% in 1970 to 11.7% in 1981. During this period, the minority population of Boston also increased from approximately 23% to almost 30% (Pet. App. A10).

2. *The Fire Department Case*

This action was originally commenced in 1972 by the Boston Chapter of the NAACP and unsuccessful black and Hispanic applicants for appointment as firefighters in the City of Boston. Plaintiffs claimed racial discrimination in violation of the Fourteenth Amendment and 42 U.S.C. 1981 and 1983 in connection with the recruitment and certification practices established by the Massachusets Civil Service Commission and appointment practices of the City of Boston Fire Department. In 1975, the Attorney General of the United States brought an action raising similar claims, together with claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.* The two actions were consolidated.

Following hearings, the district court found that blacks represented approximately 16% of Boston's population and that the combined minority population was 23% of the total population. The court also found that blacks and Hispanics represented 0.9% of the Fire Department's sworn personnel. Concluding that the firefighters' entrance

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[5] "Pet. App." refers to the appendix to the petition in No. 82-185. "C.A. App." refers to the joint appendix filed by the parties with the court of appeals.

examinations administered from 1968 through August 1971 had an adverse racial impact on blacks and Hispanics and that the tests were not job-related, the court ruled that plaintiffs had established an unrebutted case of racial discrimination in the use of the firefighters' entrance examination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974). The district court ordered a program of active recruitment of minority firefighters, enjoined further certifications based upon the results of the discriminatory examinations and ordered development of a job-related examination. The order also provided for the creation of four groups of applicants (see note 4, *supra*) and the certification of black and Hispanic applicants on a priority basis until the fire department of the municipality achieved a percentage of minorities commensurate with the percentage of minorities within the community, at which time certifications were to be made in accordance with state law (371 F. Supp. at 521-523).

The court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975). The court apparently was of the view that the use of the firefighters' examination violated both Title VII and the Constitution. See 504 F.2d at 1021.

Between 1974 and 1980, pursuant to the court's decrees, the Fire Department hired 553 firefighters, of whom 248 (45%) were black or Hispanic. As of July 1981, of the 1,690 firefighters in the Department, 248 (14.7%) were black or Hispanic (Pet. App. A10).

3. *The Present Proceedings*

a. In the spring of 1981, the Boston Police and Fire Departments initiated a reduction-in-force program as a result of budgetary restrictions imposed by a voter-initiated tax limitation measure commonly known as "proposition 2½." The Departments proposed to make the layoffs pursuant to the Massachusetts civil service statute (Mass. Ann. Laws ch. 31, § 39 (Michie/Law.

Co-op. 1973)), which requires separation from service to be in reverse order of seniority (Pet. App. A2, A10-A11). The Police Department planned to lay off 252 officers of whom 122, or 48%, were black or Hispanic. At the conclusion of the planned layoffs, 103 of the remaining 1,660 officers would have been black or Hispanic, and minority representation in the Department would have decreased from 11.7% to 6.2% (*id.* at A10-A11). The Fire Department planned to lay off 207 officers, of whom 113 (54.6%) were black or Hispanic. Had the proposed layoff program taken place, 135 of the remaining 1,483 firefighters would have been black or Hispanic, and minority representation in the Department would have decreased from 14.7% to 9.1% (*id.* at A10-A11).

In April 1981, respondents moved pursuant to Fed. R. Civ. P. 60(b) for modification of the existing remedial decrees, which had not addressed the problem of layoffs, to prevent layoffs by reverse seniority.[6] Petitioners Boston Police Patrolmen's Association and Boston Firefighters Union were allowed to intervene as parties defendant (Pet. App. A6).

On August 7, 1981, the district court issued a single opinion for both cases (Pet. App. A31-A38). Finding that the scheduled reductions in force would significantly reduce minority representation in both the police department and the fire department, the court concluded that failure to amend the remedial decrees would frustrate "the objective thereof, namely bringing minority representation up to a level approximating [their] percentage of the total population" (*id.* at A37). Accordingly, the district court enjoined the Departments from laying off their employees in any manner that would reduce the

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[6] The United States filed a similar motion in the Fire Department case, but at the hearing, the government informed the district court that it was no longer seeking a ruling on its motion. The United States did not participate in the proceedings in the court of appeals.

percentage of minority officers and firefighters below their existing levels (*id.* at A38).[7]

b. The court of appeals affirmed (Pet. App. A1-A26). The court of appeals first held that the district court had authority to consider whether modifications of the existing consent decrees were warranted in light of the unforeseen layoffs (*id.* at A12-A16). Next, the court of appeals held that the district court's limited modification of the "last hired, first fired" requirement was proper in order "to preserve the integration already achieved" (*id.* at A20). Finally, the court of appeals held that the order giving some preference for minorities was not unconstitutional discrimination against the non-minority city employees (*id.* at A20-A26). The court reasoned that the existence of past discrimination created a compelling need to employ a race conscious remedy and thus the issue was only whether the particular order was reasonable (*id.* at A23). Stating that "the public interest requires a racially balanced police force" (*id.* at A22) and that "there is

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[7] According to petitioners, 258 Boston police officers and 257 firefighters were actually laid off as a result of proposition 2½. Of these, 34 officers (or 13%) (Pet. App. A23 n.14) and 38 firefighters (or 14.7%) (82-185 Pet. 7) were minorities. If the layoffs had been made by seniority, then 130 minority police officers and 164 minority firefighters would have been dismissed (*ibid.*). Correspondingly, under the district court's order 96 non-minority police officers and 126 non-minority firefighters, who would have been entitled to retain their jobs under the Massachusetts seniority statute, were laid off. At oral argument before the court of appeals, it was disclosed that no minority police officer with a seniority date before June 1980 was laid off, whereas non-minority officers with seniority dates as early as December 30, 1970, were dismissed. Part of this disparity was caused, however, by the absolute preference for veterans in the statutory layoff scheme. Mass. Ann. Laws ch. 30, § 9A (Michie/Law. Co-op. 1973).

The district court also enjoined the members of the Massachusetts Civil Service Commission "from disapproving, invalidating or interfering with the termination" of any firefighter who challenges his termination based on the district court's order (C.A. App. 155).

nothing magical about seniority" (*ibid.*), the court of appeals held that the "orders of the district court meet the test of reasonableness" (*id.* at A23).[8]

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[8] In June 1982, Massachusetts enacted legislation providing Boston with new revenues. The legislation required that Boston rehire all police officers and firefighters terminated since July 1, 1981; all personnel available for recall were reinstated by July 1, 1982 (82-185 Pet. 8). The legislation provides that the Boston police officers and firefighters terminated during the 1981 layoffs cannot be laid off again for fiscal reasons. 1982 Mass. Adv. Legis. Serv. ch. 190, § 25 (Law. Co-op.).

The recall of laid off police officers and firefighters does not appear to moot this case. The district court's orders *permanently* enjoin the Boston Police and Fire Departments from laying off police officers and firefighters in any manner that would reduce the percentages of minority officers below specified levels. Thus, the orders prohibit indefinitely application of the Massachusetts seniority statute to any future layoffs in these Departments. Accordingly, the State petitioners have a valid interest in setting aside the district court's permanent modification of the State's seniority system, as it pertains to layoffs in the Boston Police and Fire Departments. Cf. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

In addition, police officers and firefighters who were laid off as a result of the district court's orders have a particular interest in this Court's resolution of the case. Although insulated from future layoffs by the 1982 recall law, these police officers and firefighters have appeals pending before the Massachusetts Civil Service Commission seeking relief for violation of their seniority rights, including back pay and restoration of lost seniority (Pet. 8, 17). The district court has enjoined the Commission from "disapproving * * * the termination" of the incumbent employees, which could be interpreted as barring the Commission from granting any back pay. The Court's resolution of the issue presented in this case could thus be crucial to the disposition of those administrative appeals.

In these circumstances, it appears unlikely that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Rather, the controversy in this case appears still to be "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that in exercising the equitable authority granted in Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, courts are limited by the general policies and overall objectives of the Act. See, e.g., *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8. One policy of "overriding importance" in labor law generally (*Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), and of special significance under Title VII is the maintenance of seniority systems. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); 42 U.S.C. 2000e-2(h).

Congress demonstrated particular concern in 1964 that the proposed Title VII might impair the legitimate interests of incumbent employees (see, e.g., 110 Cong. Rec. 486-489 (1964) (remarks of Sen. Hill)), and accordingly extended immunity under the statute to bona fide seniority systems. The extent to which that immunity confines the equitable discretion of district courts in remedying employment discrimination has been an issue before this Court before. Indeed, this Court decided almost the exact issue now before it in *Teamsters* v. *United States*, 431 U.S. 324 (1977), although the issue was posed in a slightly different context. In *Teamsters*, the Court built on its decision the prior Term in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), which held that constructive seniority was a proper remedy for identifiable victims of discrimination, because it equitably placed them in their rightful slot within the seniority system and did so without in any way modifying that system. In *Teamsters*, the Court was asked to decide which, if any, individuals who had failed to apply for particular employment should receive seniority relief. The Court drew the line of remedial discretion on the basis of which employees could show that they were entitled to a rightful place within the seniority system. Thus, all identifiable "victims" would be slotted above incumbent employees, but non-discriminatees were denied seniority relief.

The rule in *Teamsters* is a reflection of the relevant statutory policies that must inform the discretion of the district court in providing a remedy for a Title VII violation in hiring: actual victims must be "made whole," *Franks* v. *Bowman Transportation Co.*, *supra*, innocent incumbent employees have legitimate interests that limit the discretion of the equity court, *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and bona fide seniority systems should be allowed to remain intact, *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 10, 20-21. These policies of the Act are ignored by the order under review. This case involves nothing more than the situation facing those employees in *Teamsters* who could not make a showing that they were victims entitled to be slotted into the seniority system, but who nonetheless applied for a job and were hired. Time has passed and the financial condition of the employer has worsened. But the minorities involved are still non-victims of discrimination who can receive relief only at the expense of "bumping" incumbent white employees. See *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). Moreover, in order to grant this relief, the district court must substantially modify the seniority system as it applies to layoffs and thereby has undermined the State's statutory purpose in adopting the system. Accordingly, the reasoning and holding of *Teamsters* directly control this case and forbid the modification of the decree at issue here.

2. The district court's order, requiring non-victim minorities who are discharged because of seniority to be retained, is contrary to the last sentence of Section 706(g), 42 U.S.C. 2000e-5(g), which precludes a court from ordering reinstatement if the reason for an employee's release is something other than race or sex, etc. The last sentence in Section 706(g), which reflects the statutory intent to "make whole" victims of racial discrimination, permits employers to make employment decisions on any basis other than race and thus immunizes the decision of the City of Boston to lay off minority em-

ployees who are not victims of discrimination and who have less seniority.

3. By concluding that Title VII permitted the race conscious order at issue, the courts below have unnecessarily created a difficult constitutional issue under the equal protection component of the Due Process Clause of the Fifth Amendment. Assuming the courts below were correct and the order in this case is permissible under Title VII, then any challenge to that remedy necessarily raises issues regarding the scope of Congress' power under Section 5 of the Fourteenth Amendment to allow a court to provide for race conscious remedies. But such an issue would be appropriate for resolution only if there is clear evidence that Congress intended the courts to afford such relief. Not one word in the legislative history in either 1964 or 1972 suggests that it did. Accordingly, the Court should vacate the order as inconsistent with Title VII in order to avoid the constitutional issue that otherwise would exist. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

ARGUMENT

THE DISTRICT COURT'S ORDER EXCEEDED ITS REMEDIAL AUTHORITY UNDER TITLE VII.

Once it is adjudged that an employer has engaged in an unlawful employment practice within the meaning of Title VII, a district court is invested with authority to enjoin the employer from engaging in that practice in the future, and also is empowered to "order such affirmative action as may be appropriate, which may include * * * reinstatement, or hiring of employees, * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Although the grant of equitable authority on its face is broad, it is necessarily constrained by the policies of the Act. As this Court reiterated just last Term, "when Congress invokes the Chancellor's conscience to further transcendent legisla-

tive purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416-417 (1975). See also *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

A. The Order Of The District Court Disregards The Important Statutory Policy Embodied In Section 703(h), 42 U.S.C. 2000e-2(h), To Protect Seniority Systems, And Ignores The Legitimate Interests Of Incumbent Employees

Neither the district court nor the court of appeals engaged in anything like the searching examination of the relevant policies of the Act required by this Court's decisions. Indeed, the court of appeals disregarded both the history and purpose of Section 703(h), 42 U.S.C. 2000e-2(h), and the decisions of this Court when it failed to recognize, albeit in the context of its constitutional analysis (Pet. App. A23), that there is indeed something very important, if not "magical," about seniority systems in employment and the rights those systems allocate to employees that bear significantly on the propriety of a district court's exercise of equitable authority. See *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 13; *California Brewers Association* v. *Bryant*, 444 U.S. 598, 606-607 (1980); *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). This Court previously has pointed out that "seniority systems are afforded special treatment under Title VII itself." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977). Section 703(h), by its terms, immunizes all bona fide seniority systems from challenge under Title VII, even sys-

tems that have a disproportionate adverse impact on minorities (*Teamsters* v. *United States*, *supra*), or operate to perpetuate past employment discrimination (*United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)).[9]

Members of Congress in 1964 were very concerned about the seniority rights of employees. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 71-72 (1963); 110 Cong. Rec. 486-487 (1964) (remarks of Sen. Hill). Accordingly, Senator Clark, one of the floor managers of the bill, submitted a Justice Department memorandum stating that the proposed Title VII would not affect existing seniority rights. 110 Cong. Rec. 7207 (1964); *id.* at 7212-7215. In addition, Senator Clark submitted another memorandum which included the following question and answer (110 Cong. Rec. 7216-7217 (1964)):

> What of dismissals? Normally labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?
>
> Seniority rights are in no way affected by this bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

During the Senate debates, Section 703(h) was included in the substitute bill that eventually was adopted. The provision was adopted to clarify the Act's "present intent and effect" with regard to seniority. 110

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[9] Section 703(h) of Title VII provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such diffeerences [sic] are not the result of an intention to discriminate because of race * * *. 42 U.S.C. 2000e-2(h).

Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); *id.* at 12818-12819 (remarks of Sen. Dirksen).[10]

While Section 703(h) does not "restrict relief otherwise appropriate once an illegal discriminatory practice * * * is proved" (*Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 762; *id.* at 791-792 (Powell, J., concurring in part and dissenting in part), the particular concern Congress expressed for the operation of a last hired, first fired rule and the special status that Congress has accorded to seniority systems in Title VII must be given dispositive weight by a court when crafting affirmative equitable relief for minority employees, such as those laid off in this case. 424 U.S. at 791-792. Cf. *American Tobacco Co.* v. *Patterson*, *supra*, slip op. 14.

Indeed, although this Court obviously has never dealt with this particular situation, its prior decisions dealing with comparable problems compel the conclusion that the relief granted in this case was impermissible. The first decision of this Court concerning the remedial authority of a court in the context of a seniority system was *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). *Franks* involved a claim of unlawful discrimination by a class of black nonemployee applicants who unsuccessfully sought employment as over-the-road truck drivers. The district court found that the employer had engaged in a pattern of racial discrimination in hiring, transfer, and discharge of employees. The district court ordered the employer to give priority consideration to class members for over-the-road jobs, but declined to award back pay or constructive seniority retroactive to the date of individual application. The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

This Court held that for actual victims of unlawful discrimination constructive seniority back to the date of the

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[10] Congress made no change in Section 703(h), when it revised Title VII in 1972. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 354 n.39.

discriminatory act was an appropriate remedy in order to restore those victims to their "rightful place," that is, "restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764, quoting 118 Cong. Rec. 7168 (1972). See also *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421. But even in providing that actual victims must receive constructive seniority, this Court took pains to point out that "[n]o claim is asserted that nondiscriminatee employees holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned." 424 U.S. at 776.[11]

Significantly, the constructive seniority rights awarded in *Franks* were not judicially invented rights, but only the rights defined by the existing seniority system itself, once the "rightful place" in that system of each identifiable victim of discrimination was determined.[12] The seniority rights of incumbent employees would also continue to be defined by that system, even though the "rightful place" in that system of some of those incumbents would be adjusted to accommodate the rights of individuals who would have been senior to them but for

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[11] Lower courts have expressly held that the relief for actual discriminatees does not extend to bumping employees previously occupying jobs; victims must wait for vacancies to occur. See, e.g., *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969). This understanding of the limits of Section 706(g) with regard to actual victims may well have been ratified by Congress in 1972, since it was aware of the *United Papermakers* decision and nothing indicates that the amendment to Section 706(g) was an attempt to alter that interpretation. See Staff Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1844 (Comm. Print 1972).

[12] In the absence of a seniority system prescribed by contract or statute, incumbent employees would have no legally enforceable seniority rights, and there would be no occasion to award such rights to victims of discrimination (who would not have enjoyed any such rights had the discrimination not occurred).

the employer's unlawful discriminatory acts. See 424 U.S. at 774-779. Thus, the relief prescribed in *Franks* fundamentally preserves rather than abrogates rights under bona fide seniority systems, while extending those rights to identifiable victims of discrimination in order to make them whole.

A year later, the Court was faced with the need to further refine the relationship between seniority and the remedial authority of the district court under Title VII in *Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the defendant trucking company was found to have engaged in an unlawful pattern or practice of confining blacks and Hispanics to lower paying, less desirable jobs, and excluding them from positions as over-the-road truck drivers. The seniority system in the employer's collective-bargaining agreements provided that an incumbent employee who transferred to an over-the-road position was required to forfeit the competitive seniority he had accumulated in his previous position (company seniority) and to start at the bottom of the over-the-road drivers' seniority list. After affirming the district court's finding of liability under Title VII, the court of appeals held that all black and Hispanic incumbent employees—including those who had never applied for over-the-road positions—were entitled to bid for future over-the-road jobs on the basis of their accumulated company seniority. The appeals court further held that each class member filling such a job was entitled to an award of retroactive seniority on the over-the-road driver's seniority list dating back to the class member's "qualification date"—the date when (1) an over-the-road driver position was vacant and (2) the class member met or could have met the job's qualifications.

This Court first reversed the holding that the defendant's seniority system was itself subject to attack as perpetuating the past effects of discrimination. Although the system appeared to violate the rationale in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court held that Congress did not "outlaw the use of existing

seniority lists and thereby destroy or water down the vested seniority rights of employees * * *." 431 U.S. at 352-353. The Court then considered how to remedy the other discriminatory employment practices that had been proved. This Court rejected the defendant's argument that only individuals who had actually applied for OTR positions could obtain relief under Section 706(g). Instead, the Court held that relief in the form of constructive seniority was available to those who could satisfy their burden to prove that they were deterred from applying for that position because of the employer's discriminatory practices and that they were qualified for the job. 431 U.S. at 372. This latter class of plaintiffs, like those who were actually precluded from obtaining the OTR jobs, could show when they presumably would have been employed, but for the discrimination, and thus relief to them would not require modification of the seniority system itself, but merely "rightful place" fitting of individuals into that system. 431 U.S. at 358. As for those who could not make such a showing, the necessary implication is that they were not entitled to any relief in the form of constructive seniority.

In combination, *Franks* and *Teamsters* show that Title VII remedies must preserve the seniority rights protected generally in Section 703(h), and may modify those rights only to the extent necessary to place identifiable victims of discrimination in their rightful place in that system. This accommodation serves two very important concerns of equity jurisprudence under Title VII that were ignored by the courts below—the importance of maintaining the basic seniority system and the need to be fair to innocent incumbent employees. With regard to the latter concern, this Court noted in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978), "[t]he basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." See also *Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982). Accordingly, in crafting equitable relief under

Title VII, courts must consider the legitimate interests of "innocent third parties." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 20.[13] Indeed, even in a case (unlike this one) in which specified victims of unlawful employment discrimination have been identified, a court, in determining their rightful place, is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters* v. *United States*, *supra*, 431 U.S. at 372.

In *Ford Motor Co.* v. *EEOC*, *supra*, this Court relied upon both the basic congressional intent to protect seniority and the importance of fairness to incumbent employees in deciding that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied him for impermissible reasons. The Court expressly rejected the argument that the employer must also offer seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[] job offers that compel *innocent workers* to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." Slip op. 21; emphasis added. Foreseeing the possibility that layoffs could occur before the reinstated (or newly hired) claimant's Title VII suit was decided, the Court reasoned that (*ibid.*)

> an employer may have to furlough an innocent worker indefinitely while retaining a claimant who

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[13] In *Franks* the interests of the innocent employees obviously were affected by the constructive seniority remedy. But incumbents were afforded a substantial measure of protection by being allowed to remain in jobs, with accumulated seniority, that had been obtained in part because of discrimination by their employer. 424 U.S. at 774. In light of the advantage they had obtained from the prior discrimination, it was basically fair to slot victims into the seniority system and then allow the system to continue operating as the race-neutral basis for allocating future rights. *Id.* at 774-775.

> was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII * * * require innocent employees to carry such a heavy burden.

What emerges from this Court's decisions is the firm rule that a district court in a Title VII case may not modify a bona fide seniority system; it can only slot individuals into their rightful place within that system—and individuals, such as those involved in this case, who are only beneficiaries of affirmative action and not victims of discrimination entitled to rightful place relief, have no basis for claiming any seniority in addition to what they have actually accrued on the job.[14] Thus, when the initial hiring order was issued in 1975, the district court would have been wholly without any authority either to slot new applicants in place of incumbents (see note 11, *supra*) or even to award them constructive seniority when hired. The district court's order insulating a certain percentage of minority employees from dismissal under the statutory seniority system was, however, tantamount to an award of constructive seniority that placed its beneficiaries in a position superior to that of incumbent non-minority employees.[15] Since the order concededly embraced persons

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[14] Under *Teamsters*, of course, the district court in this case should have determined who among incumbent black and Hispanic police officers and firefighters had been actual victims of the defendant's original hiring discrimination and adjusted the competitive seniority of those victims. See *Chance* v. *Board of Examiners*, 534 F.2d 993, 999, 1007 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977). Layoffs then would proceed in order of reverse seniority, as prescribed by state law. Given the four classes of priority hiring, it is not clear whether any actual victims would have been laid off even without some constructive seniority (see note 4, *supra*).

[15] It is of no significance that the award of constructive seniority here was only for the limited purpose of determining who would

who were not victims of the defendants' unlawful employment discrimination, the district court's award of retroactive seniority was indistinguishable—save in its timing—from the award condemned in *Teamsters*.[16]

In the instant case, innocent firefighters and police officers were required to sacrifice not only their seniority, but also their jobs to persons who have never claimed to be victims of unlawful discrimination. As a result of the district court's decree, white firefighters and police officers—some with more than ten years of service—were furloughed, while black and Hispanic employees with as little as two years' seniority were retained.[17] This was

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be laid off. Under the State's presumptively bona fide seniority system, that important question was to be determined on the basis of seniority.

[16] The central flaw in the court of appeals' logic is its assertion that allowing layoffs to be based on seniority somehow makes "a mockery of the equitable relief already granted" (Pet. App. A19). But there has been no new violation of the Act that would require a modification of the decree and accordingly the issue is simply whether the district court could have modified the seniority system when it initially entered its order in 1975. The layoffs, which are a product of an unforeseeable modification in the City's budget, do not significantly undermine the prior order. If the City of Boston had been faced with this budgetary crisis in 1975, when the original affirmative action order was imposed, no one would have suggested that the remedial order was undermined by the temporary failure of the City to integrate its work force. Certainly, the district court would have lacked authority either to order the City to hire additional employees or to require the City to bump incumbent white employees to make room for minority hires. See cases cited note 11, *supra*. The order in this case does no more than retroactively accomplish what the court could not have done directly in 1975 if the economic problems had existed then. It required the City either to bump incumbent whites or do what the State eventually provided for, hire more people. This result is directly contrary to this Court's admonition that equity under Title VII should not permit " 'different results for breaches of duty in situations that cannot be differentiated in policy.' " *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8 (citation omitted).

[17] Unlike the voluntary craft training program in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court's layoff order re-

not a permissible exercise of remedial authority under Title VII. That remedial authority is limited to the effectuation of the policies of the Act: one of the Act's firmly established policies is the preservation of bona fide seniority systems. There is no suggestion of any discriminatory purpose underlying the seniority system in this case and accordingly the district court was without authority to reconstruct it.

B. An Additional Indication That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case Is The Limitation On Remedial Authority Contained In The Last Sentence of Section 706(g)

Our argument that the policies of Title VII make plain that seniority systems ought not to be modified to grant the beneficiaries of affirmative action additional protection from layoffs is reinforced by the limitation in the last sentence of Section 706(g). That sentence reads in pertinent part:

> No order of the court shall require the * * * reinstatement of an individual as * * * an employee * * * if such individual * * * was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.[18]

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quired discharge of senior white employees, solely in order to maintain existing racial percentages. Even in interpreting Title VII's prohibitions in a context not involving state action, *Weber* disapproved actions which "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. In contrast to this case, two of the critical facts leading to the conclusion that the training program in *Weber* did not violate Title VII were that the program did not require the discharge of white workers and their replacement with new black hires and was not intended to maintain racial balance.

[18] In an interpretative memorandum—characterized by this Court as one of the "authoritative indicators" of the meaning of Title

The district court's order in this case is contrary to both the language and spirit of this provision.

The court basically has ordered specific minority employees scheduled for layoffs to be reinstated. But those employees were laid off on the basis of a bona fide seniority system. Such layoffs constitute employment action for a reason unrelated to race and are otherwise perfectly legal. See, e.g., *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, 508 F.2d 687 (3d Cir. 1975), cert. denied, 425 U.S. 998 (1976); *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). Accordingly, Section 706(g) by its terms precludes the kind of individual redress granted to these minority employees who have suffered no discrimination.

This conclusion is also required by the remedial purposes of Title VII embodied in Section 706(g). As this Court has recognized, "[t]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977). The central remedial purposes of Title VII are, as this Court has often observed, "to end discrimination * * * [and] to compensate the victims for their injuries." *Ford Motor Co.* v. *EEOC*, *supra*, slip op.

VII (*American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 10)—Senators Clark and Case, the bipartisan "captains" responsible for explaining and defending Title VII in the Senate debate, explained the provision's intended effect: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin." 110 Cong. Rec. 7214 (1964). See also statements by Senators Humphrey and Kuchel. *Id.* at 6549, 6563.

11; see, e.g., *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. In this latter connection, "the purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (footnote omitted);[19] accord, *Teamsters* v. *United States*, *supra*, 431 U.S. at 364.

Since the remedial authority of courts under Section 706(g) is limited by the provision's very terms to effectuating the Act's overriding purposes of bringing discrimination to an end and compensating victims for their injuries, the district court lacked authority to enter the modification of the remedial order in this case. The persons who benefitted from the district court's reconstructed seniority system were not victims of discrimination, and the grant of constructive seniority to them distorts the statutory purpose. It also brings into being a new class of victims, completely innocent of any wrongdoing, by depriving them of their rights under a valid seniority system (see pages 18-20, *supra*).

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[19] In *Franks* the Court thoroughly canvassed Title VII's legislative history, relying particularly on the 1972 amendments to Section 706(g). The section-by-section analysis accompanying the Conference Committee Report on the 1972 amendments emphatically confirms the "make whole" purpose of Title VII: "[T]he scope of relief under that section of the Act is *intended to make the victims of unlawful discrimination whole*, * * * restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (emphasis added), quoted in *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764, and *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421. Moreover, "[t]he Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764 n.21.

C. The Courts Below Should Have Avoided Creating A Substantial Constitutional Question By Refraining From Issuing A Race Conscious Seniority Order That Was Not Clearly Intended By Congress In Title VII

After the court of appeals held that the district court's order was permissible under Title VII, it necessarily addressed the constitutionality of the race conscious order under the equal protection component of the Due Process Clause of the Fifth Amendment.[20] The sole purpose of the layoff order, as the court of appeals candidly asserted, was to prevent any reduction in the percentage of minority employees in the Boston Police and Fire Departments—"to maintain some semblance of racial balance" in the police and firefighter forces (Pet. App. A22). Obviously, such an order classifies on the basis of race (indeed, disadvantages some persons because of their race) and thereby implicates a serious equal protection concern.

Whether Congress could provide under Section 5 of the Fourteenth Amendment that race conscious modifications of a seniority system to remedy past discrimination are permissible in order to maintain an integrated work place and, if so, what types of modifications it could approve are novel issues that have never been decided by this Court. Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980). But they are questions that should be addressed only when it is fairly clear that Congress intended to authorize such relief and thereby force the Court to evaluate Congress' power to act through the courts on a race conscious basis.[21] This is particularly so in a Title VII case, where

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[20] Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See *Ex parte Virginia*, 100 U.S. 339 (1879).

[21] Another possibility, not presented here, would be a requirement that other race-neutral indicia of merit, in addition to senior-

the district court's equitable authority is carefully delimited by Congress' intent and the purposes of the Act. See *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8; *Teamsters* v. *United States*, *supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 416-417. Thus, if the Act does not support the order of the court, there is no residual equitable discretion.

Regardless of what can be gleaned from the legislative history of Title VII with regard to its general policies, there is not a shred of evidence that Congress either in 1964 or 1972 intended to authorize a district court to modify a last-hired, first-fired rule in order to maintain racial balance.[22] Moreover, no court had ever considered the issue prior to 1972. In the absence of clear evidence of at least arguable congressional intent to allow a district court to take into account such societal concerns as a basis for disadvantaging one group over another with regard to seniority, the courts below should have declined to interpret Title VII to authorize the order adopted in this case and thereby avoided any need to confront the difficult con-

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ity, be utilized in determining which employees to lay off, in the hope of preserving more of the results of the consent decree. It might well be within the constitutional power of Congress to impose such a requirement, but, for reasons previously stated, it is doubtful that judicial modification of the seniority system in that way would be consistent with the remedial policies of Title VII.

[22] The court of appeals opined that racial balance in public safety departments is necessary to avoid "antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." Pet. App. A24-A25. If such concerns had led state or local authorities to adopt a race conscious hiring or layoff plan because of operational needs in enhancing the community's police or fire protection, a substantial constitutional question would be presented. *Cf. Morton* v. *Mancari*, 417 U.S. 533 (1974). But the state-required seniority system precluded the assertion here by city or state authorities of any such operational needs, and it was improper in these circumstances for the courts below to hypothesize such operational needs and thereby impinge upon constitutionally protected interests of individuals in the absence of a claim by the state of a need to do so.

stitutional issue created by such an order. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 8; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-185-CFX
Status: GRANTED

Title: Boston Firefighters Union, Local 718, Petitioner
v.
Boston Chapter, NAACP, et al.

Docketed:
August 2, 1982

Court: United States Court of Appeals
for the First Circuit

Vide:
82-246
82-259

Counsel for petitioner: McMahon, John

Counsel for respondent: Dittmar, James S., McGee, Frank J., Kiley, Thomas R.

Entry	Date	Note	Proceedings and Orders
1	Aug 2 1982	G	Petition for writ of certiorari filed.
3	Aug 9 1982		Order extending time to file response to petition until October 1, 1982.
4	Sep 17 1982		20 copies of lodging entitled Addendum Medical, etc., received.
5	Oct 1 1982	G	Motion of International Association of Fire Fighters, AFL-CIO for leave to file a brief as amicus curiae filed.
6	Oct 4 1982		Brief of respondent Boston Ch., NAACP, et al. in opposition filed. VIDED.
7	Oct 6 1982		DISTRIBUTED. October 29, 1982
8	Nov 1 1982		Motion of International Association of Fire Fighters, AFL-CIO for leave to file a brief as amicus curiae GRANTED.
9	Nov 1 1982		Petition GRANTED. The case is consolidated with Nos. 82-246 and 82-259 and a total of one hour is allotted for oral argument.
			**********
10	Dec 16 1982		Brief amicus curiae of Intl. Assn. of Firefighters filed.
11	Dec 16 1982		Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
12	Dec 16 1982	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
14	Dec 17 1982		Joint appendix filed.
15	Dec 17 1982		Brief of petitioner Boston Firefighters Union filed. VIDED.
16	Dec 17 1982		Brief of petitioner Boston Police Patrolmen's Association in No. 82-246 filed. VIDED.
18	Dec 17 1982	G	Motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae filed.
20	Dec 18 1982		Record filed.
21	Dec 18 1982		Cert. orig. record & proceedings received, 1 blue folder & 2 boxes.
22	Dec 17 1982	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
23	Dec 22 1982		Brief amicus curiae of Detroit Police Officers Association filed.
24	Dec 22 1982		Brief amicus curiae of United States filed. VIDED.
25	Dec 28 1982		Brief of petitioners Nancy B. Beecher, et al. in No. 82-259 filed. VIDED.
26	Dec 27 1982	D	Motion of Boston Firefighters Union, Local 718, for

No. 82-185-CFX

Entry	Date	Note	Proceedings and Orders
			divided argument filed.
27	Dec 27 1982	D	Motion of Boston Firefighters Union, Local 718 for additional time for oral argument filed.
29	Dec 30 1982		Order extending time to file brief of respondent on the merits until February 6, 1983.
30	Dec 30 1982	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Dec 29 1982		Application for leave to file respondents' brief on the merits in excess of the page limitations filed.
32	Dec 29 1982		Order granted by Brennan, J. on December 30, 1982. Brief may not exceed 75 pages.
33	Jan 3 1983	D	Motion of Boston Police Patrolmen's Association, Inc. for divided argument filed.
34	Jan 3 1983	D	Motion of Boston Police Patrolmen's Association, Inc. for additional time for oral argument filed.
35	Jan 3 1983	G	Motion of Nancy B. Beecher, et al. for divided argument filed.
36	Jan 10 1983		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
37	Jan 10 1983		Motion of American Federation of Labor and Congress of Industrial GRANTED. Justice Marshall OUT.
38	Jan 10 1983		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
39	Jan 12 1983	G	Motion of Thomas R. Kiley, Esquire, to permit Thomas A. Barnico, Esquire, to present oral argument pro hac vice on behalf of petitioners in No. 82-259 filed.
40	Jan 17 1983		Motion of Boston Firefighters Union, Local 718, for divided argument DENIED. Justice Marshall OUT.
41	Jan 17 1983		Motion of Boston Firefighters Union, Local 718 for additional time for oral argument DENIED. Justice Marshall OUT.
42	Jan 17 1983		Motion of Boston Police Patrolmen's Association, Inc. for divided argument DENIED. Justice Marshall OUT.
43	Jan 17 1983		Motion of Boston Police Patrolmen's Association, Inc. for additional time for oral argument DENIED. Justice Marshall OUT.
44	Jan 17 1983		Motion of Nancy B. Beecher, et al. for divided argument GRANTED. Justice Marshall OUT.
45	Jan 17 1983		Motion of the Solicitor General for leave to participate in oral DENIED. Justice Marshall OUT.
46	Jan 17 1983		DISTRIBUTED. Jan. 21, 1983. (Motion of Thomas R. Kiley to permit Thomas A. Barnico to present oral argument).
47	Jan 24 1983		Motion of Thomas R. Kiley, Esquire, to permit Thomas A. Barnico, GRANTED. Justice Marshall OUT.
48	Feb 4 1983		Brief amicus curiae of Natl. Bar Assn., et al. filed. VIDED.
49	Feb 7 1983		Brief amicus curiae of League of United Latin American Citizens, et al. filed. VIDED.
50	Feb 7 1983	G	Motion of National Education Association for leave to file a brief as amicus curiae filed.
51	Feb 8 1983		Brief amicus curiae of National Black Police Assoc. et al.

No. 82-185-CFX

Entry	Date	Note	Proceedings and Orders
			filed. VIDED.
52	Feb 9 1983		Brief of respondents Boston Ch., NAACP, et al. filed. VIDED.
53	Feb 9 1983		Brief amicus curiae of Officers For Justice, et al. filed. VIDED.
54	Feb 9 1983		Brief amicus curiae of City of Detroit filed. VIDED.
55	Feb 8 1983		Brief amicus curiae of Affirm. Action Coordinating Center, et al. filed. VIDED.
56	Feb 10 1983		Brief amicus curiae of NAACP, Legal Defense & Educational Fund filed. VIDED.
57	Feb 10 1983		Brief amicus curiae of Robert Lipshutz filed. VIDED.
58	Feb 22 1983		Motion of National Education Association for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
59	Mar 8 1983		Brief amicus curiae of Natl. Org. for Women, et al. filed. VIDED.
60	Mar 11 1983		CIRCULATED.
61	Mar 21 1983	D	Motion of American Jewish Congress for leave to file a brief as amicus curiae filed.
62	Mar 24 1983		SET FOR ARGUMENT. Monday, April 18, 1983. (4th case) The case is consolidated with Nos. 82-246 & 259 (1 hr.)
63	Mar 28 1983		Motion of American Jewish Congress for leave to file a brief as amicus curiae DENIED. Justice Marshall OUT.
64	Apr 11 1983	X	Reply brief of petitioner filed. VIDED.
65	Apr 12 1983	X	Reply brief of petitioner Boston Firefighters Union filed. VIDED.
66	Apr 18 1983		ARGUED.